No. 92-1500-CFH
Status: GRANTED

Title: Paul Caspari, Superintendent, Missouri Eastern Correctional Center, et al., Petitioners
v.
Christopher Bohlen

Docketed:
March 8, 1993

Court: United States Court of Appeals for the Eighth Circuit

Counsel for petitioner: Jung,Frank A.

Counsel for respondent: Sindel,Richard

Consulted F. Lorson re type 3-16-93, OK to process.

Entry	Date	Note	Proceedings and Orders
1	Mar 8 1993	G	Petition for writ of certiorari filed.
2	Mar 8 1993		Appendix of petitioner filed.
4	Apr 1 1993		Order extending time to file response to petition until May 7, 1993.
5	Apr 7 1993		Brief amici curiae of Arkansas, et al. filed.
6	Apr 29 1993		Order further extending time to file response to petition until May 13, 1993.
7	May 13 1993		Brief of respondent Christopher Bohlen in opposition filed.
8	~~May 13~~ 1993	G	Motion of respondent for leave to proceed in forma pauperis filed.
9	May 19 1993		DISTRIBUTED. June 4, 1993
11	Jun 7 1993		REDISTRIBUTED. June 11, 1993
12	Jun 14 1993		Motion of respondent for leave to proceed in forma pauperis GRANTED.
13	Jun 14 1993		Petition GRANTED.
			**********
25	Jul 1 1993	G	Motion of respondent for appointment of counsel filed.
14	Jul 28 1993	G	Motion of Criminal Justice Legal Foundation for leave to file a brief as amicus curiae filed.
15	Jul 28 1993		Brief amici curiae of Arkansas, et al. filed.
18	Jul 28 1993		Record filed.
		*	Original proceedings United States District Court for the Eastern District of Missouri.
16	Jul 29 1993	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
17	Jul 29 1993		Brief amicus curiae of United States filed.
20	Jul 29 1993		Joint appendix filed.
21	Jul 29 1993		Brief of petitioners Paul Caspari, et al. filed.
22	Jul 29 1993		Brief amicus curiae of Cook County filed.
19	Jul 30 1993		Record filed.
		*	Partial proceedings United States Court of Appeals for the Eighth Circuit.
23	Sep 1 1993		Brief amici curiae of National Legal Aid And Defender Association, et al. filed.
24	Sep 1 1993		Brief of respondent Christopher Bohlen filed.
26	Sep 24 1993		Motion of Criminal Justice Legal Foundation for leave to file a brief as amicus curiae GRANTED.
27	Sep 24 1993		Motion of the Solicitor General for leave to participate

Entry	Date	Note	Proceedings and Orders
			in oral argument as amicus curiae and for divided argument GRANTED.
29	Sep 29 1993		Reply brief of petitioners filed.
28	Oct 4 1993		Motion for appointment of counsel GRANTED and it is ordered that Richard H. Sindel, Esquire, of Clayton, Missouri, is appointed to serve as counsel for the respondent in this case.
30	Oct 12 1993		CIRCULATED.
31	Oct 14 1993		SET FOR ARGUMENT MONDAY, DECEMBER 6, 1993. (2ND CASE).
32	Nov 15 1993	D	Application (A93-420) release on bond pending disposition of petition for certiorari, submitted to Justice Blackmun.
33	Nov 17 1993		Application (A93-420) denied by Justice Blackmun.
34	Dec 6 1993		ARGUED.

92-1500

No. 92-_____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1992

PAUL CASPARI, Superintendent of the Missouri Eastern Correctional Center, and JEREMIAH W. (JAY) NIXON, Attorney General of Missouri,
Petitioners,
v.
CHRISTOPHER BOHLEN,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JEREMIAH W. (JAY) NIXON
Attorney General, State of Missouri

STEPHEN D. HAWKE
Assistant Attorney General
Counsel of Record

FRANK A. JUNG
Assistant Attorney General
of Counsel
P.O. Box 899
Jefferson City, MO 65102
(314) 751-3321
Attorneys for Petitioners

28pp

QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER THE DOUBLE JEOPARDY CLAUSE WHICH PROHIBITS THE STATE FROM SUBJECTING A DEFENDANT TO SUCCESSIVE CAPITAL SENTENCING PROCEEDINGS SHOULD APPLY TO SUCCESSIVE NON-CAPITAL SENTENCE ENHANCEMENT PROCEEDINGS.

II.

WHETHER THIS COURT'S DECISION IN BULLINGTON V. MISSOURI, 451 U.S. 430 (1981) EXPANDS THE PROTECTION AFFORDED BY THE DOUBLE JEOPARDY CLAUSE CONTRARY TO THE ORIGINAL INTENT OF THE CLAUSE AS ARTICULATED BY THE FRAMERS OF THE CONSTITUTION AND BEYOND THE TRADITIONAL PROTECTIONS OF THE CLAUSE.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

PAUL CASPARI, Superintendent of the Missouri Eastern Correctional Center, and JEREMIAH W. (JAY) NIXON, Attorney General of Missouri,
Petitioners,

v.

CHRISTOPHER BOHLEN,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

OPINIONS BELOW

The October 16, 1992 panel opinion of the United States Court of Appeals granting the petition for writ of habeas corpus is reported at 979 F.2d 109 (8th Cir. 1992), and is included in the Appendix at A-3. The order of the United States District Court for the Eastern District of Missouri denying the petition for writ of habeas corpus is not reported but is

included in the Appendix (A-25). The magistrate's report and recommendation is not published, but is included in the Appendix (A-27).

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Eighth Circuit issued its opinion on October 16, 1992. The motion for rehearing or rehearing *en banc* was denied on December 8, 1992. Pursuant to 28 U.S.C. §2201(c) and Supreme Court Rules 13.1 and 13.4, the present petition for writ of certiorari was required to be filed by petitioners within ninety days. Jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, lliberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section one of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Respondent was charged with robbing Blust Jewelry Store in the Town and Country Mall in St. Louis County. Respondent took currency and jewelry from the store and wristwatches from two employees. Respondent was convicted in the Circuit Court of St. Louis County, Missouri, of three counts of robbery first degree, §569.020, RSMo 1986, and sentenced as a prior and persistent offender under §558.016, RSMo 1986, to consecutive terms of fifteen years imprisonment on each count. The conviction was affirmed on direct appeal by the Missouri Court of Appeals. See ***State v. Bohlen***, 670 S.W.2d 119 (Mo.App. 1984) (A-63). However, the Court of Appeals remanded the cause to determine respondent's status as a prior and

persistent offender. *Id.* The Circuit Court found respondent to be a prior and persistent offender after receiving evidence that respondent had prior convictions for possession of heroin, unlawful delivery of a controlled substance and two (2) counts of violation of Illinois' Controlled Substance Act (A-75). The Court again sentenced respondent to consecutive terms of fifteen years imprisonment on each count. The sentences were affirmed on appeal after remand. *See* ***State v. Bohlen***, 698 S.W.2d 577 (Mo.App. 1985) (A-57).

Respondent also filed a post-conviction relief motion in the Circuit Court under former Missouri Supreme Court Rule 27.26 (repealed effective January 1, 1988). Upon denial of that motion, respondent appealed the Circuit Court's judgment to the Missouri Court of Appeals which affirmed. *See* ***Bohlen v. State***, 743 S.W.2d 425 (Mo.App. 1987).

On September 5, 1989, respondent filed a petition for writ of habeas corpus under 28 U.S.C. §2254 before the United States District Court for the Eastern District of Missouri (A-84). After responsive pleadings, Magistrate David Noce recommended that respondent's petition be denied (A-27). The Honorable Clyde Cahill sustained and adopted the Magistrate's Report and Recommendation and denied respondent's petition on August 28, 1991 (A-25).

The United States Court of Appeals for the Eighth Circuit reversed and remanded the district court's denial of respondent's petition for writ of

habeas corpus on October 16, 1992. *See* ***Bohlen v. Caspari***, 979 F.2d 109 (8th Cir. 1992) (A-3). The court ordered the respondent to be released from custody unless the state resentenced respondent without invoking the persistent offender statute. Rehearing was denied on December 8, 1992 (A-83).

ARGUMENT
I.

WHETHER THE DOUBLE JEOPARDY CLAUSE WHICH PROHIBITS THE STATE FROM SUBJECTING A DEFENDANT TO SUCCESSIVE CAPITAL SENTENCING PROCEEDINGS SHOULD APPLY TO SUCCESSIVE NON-CAPITAL SENTENCE ENHANCEMENT PROCEEDINGS.

The present case presents a significant question because it allows this Court to finally decide whether the holding in ***Bullington v. Missouri***, 451 U.S. 430 (1981) applying the Double Jeopardy Clause to capital sentencing proceedings is applicable in non-capital sentence enhancement proceedings, an issue that was expressly left undecided by this Court in ***Lockhart v. Nelson***, 488 U.S. 33, 37 n.6 (1988). The present case also allows this Court to resolve the conflicts among the lower courts, state and federal, regarding the application of the Double Jeopardy Clause to non-capital enhancement proceedings. *See* ***Hunt v. New York***, 112 S.Ct. 432 (1991) (White, J., dissenting from denial of certiorari).

In ***Bullington v. Missouri***, *supra*, this Court applied the Double Jeopardy Clause to capital sentencing proceedings. The holding in ***Bullington*** rested on a belief that capital sentencing is different. *See* ***Barefoot v. Estelle***, 463 U.S. 880, 913 (1983) (Marshall, J. dissenting) ("Time and again the court has condemned procedures in capital cases that

might be completely acceptable in an ordinary case. *See, e.g.*, ***Bullington v. Missouri***, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981)").

Though the Double Jeopardy Clause prohibits retrial of a defendant who has been acquitted of the crime charged, it does not extend to the "imposition of a particular sentence" because a sentence is not regarded as an acquittal. ***Bullington v. Missouri***, *supra*, 451 U.S. at 437-38. In fact, the Double Jeopardy Clause does not prohibit the imposition of a harsher sentence after retrial. *Id.* As noted in ***Bullington***, the jury's discretion under Missouri's capital sentencing proceedings was limited to imposing either life imprisonment or capital punishment. *Id.* Moreover, the capital punishment proceeding consisted of opening statements, presentation of evidence, testimony, instruction to jurors and final arguments. *Id.*, 451 U.S. at 438 n. 10. In distinguishing ***North Carolina v. Pearce***, 395 U.S. 711 (1969), this court noted that unlike the jury in ***Pearce***, which had a wide range of punishment from which to choose, the jury in ***Bullington*** was restricted to either life imprisonment or capital punishment.

This court has previously rejected the application of the Double Jeopardy Clause to sentencing enhancement proceedings in the federal system. ***United States v. DiFrancesco***, 449 U.S. 117 (1980). Like the sentencing enhancement proceedings in ***DiFrancesco***, the judge could have sentenced respondent to a broad range of

punishment.[1] Since the judge could sentence respondent within a range of ten to thirty years or life, the reasoning of ***Bullington*** is inapplicable to non-capital enhancement proceedings. This lack of sentencing discretion that was a rationale for this Court's application of the Double Jeopardy Clause to capital sentencing proceedings is not present in this non-capital case. ***Bullington v. Missouri***, *supra*, 451 U.S. at 441.

The Court of Appeals determined that the Missouri's enhancement proceeding resembled a trial because the state had to prove respondent's prior convictions; thus, double jeopardy protections should be applicable. As noted by the Tenth Circuit in ***Linam v. Griffin***, 685 F.2d 369 (10th Cir. 1982), a case which the Eighth Circuit attempted to distinguish, a sentencing enhancement "is not a conviction of a distinct crime." *Id.* at 375. The enhancement proceeding is not "an ingredient of the judgment on the merits." *Id.* at 374.

---

[1]Respondent was convicted on three (3) counts of the Class A felony of first degree robbery (§569.020, RSMo 1986) and sentenced under §558.011, RSMo 1986 to fifteen years imprisonment on each count. The range of punishment for a Class A felony is a term of imprisonment not less than ten years and not to exceed thirty years, or life imprisonment. As a persistent offender, the judge could sentence respondent only within the range of a Class A felony. §558.016, RSMo 1986.

Green v. United States, 355 U.S. 184 (1957) held that when an individual convicted of a lesser included offense obtains a new trial, he cannot be re-tried on the greater offense. If an individual is not found to be a persistent offender, this is not the same as an acquittal of a greater offense and a conviction of a lesser included offense. That is because a defendant may be acquitted of a crime but not of a sentence. The proceedings in ***Bullington*** required the jury to consider facts bearing upon the defendant's guilt or innocence. ***Linam v. Griffin***, *supra*, 685 F.2d at 375. Unlike capital sentence proceedings, the increase in sentence "has nothing to do with the basic cause being tried." *Id.* Rather, an enhancement proceeding is only a proceeding about the status of the defendant to determine whether he has previous convictions.

Not only did the ***Bullington*** court note the limited discretion placed on the jury in Missouri capital sentencing proceedings, it also noted that the punishment phase was a trial on the issue of punishment. However, the persistent offender hearing is not a trial on the punishment that the defendant should receive. Rather, if the defendant is found to be a persistent offender the statute merely authorizes the judge to enhance the sentence. Any error during the persistent offender hearing does not invoke the double jeopardy clause since it is not an adjudication: "Considering the fact that [the enhancement proceeding] in no way [can] be considered a guilt or innocence adjudication, it is almost like sending it back to mend the record."

Linam v. Griffin, *supra*, 685 F.2d at 376.

The grant of certiorari will also allow this Court to resolve the conflicts among the lower courts, state and federal, which have discussed the application of ***Bullington v. Missouri***, *supra*, to non-capital enhancement proceedings. Although the Court of Appeals' opinion calls the split among the Circuits "illusory", a closer look shows that the cases cited by Justice White in ***Hunt v. New York***, *supra*, clearly contrast with the holding by the Eighth Circuit Court of Appeals. The Court of Appeals also stated: "[t]o the extent that any of the other federal circuits or the Missouri courts have held to the contrary, we think they were mistaken". This language indicates that the Eighth Circuit Court of Appeals recognized inconsistencies among the circuits, and then expressly rejected those decisions as contrary to the panel's beliefs.

In ***Linam v. Griffin***, *supra*, the Tenth Circuit declined to apply ***Bullington*** to New Mexico's Habitual Criminal Act even though many of the protections afford a defendant at trial are extended to the habitual offender hearing. *Id.*, 685 F.2d at 372. Though the evidence in ***Linam*** was erroneously excluded, the holding in ***Linam*** was not based on the erroneous exclusion but rather because the sentencing proceeding in ***Bullington*** was an integral part of the trial. *Id.* at 375.

Likewise, the Seventh Circuit held that when the habitual offender statute does not "require consideration of the underlying facts on the

substantive charge" ***Bullington*** does not apply. ***Denton v. Duckworth***, 873 F.2d 144, 148 (7th Cir. 1989).

On the other hand, the Fifth Circuit applied the ***Bullington*** application to Texas' Habitual Offender statute. ***Bullard v. Estelle***, 665 F.2d 1347 (5th Cir. 1982), *vacated and remanded on other grounds*, 459 U.S. 1139 (1983). In ***Durosko v. Lewis***, 882 F.2d 357 (9th Cir. 1989), *cert. denied*, 495 U.S. 907 (1990), the Ninth Circuit, while acknowledging the Seventh Circuit's rejection of ***Bullington*** to non-capital enhancement proceedings, chose to follow the Fifth Circuit standard. *Id.* at 359.

Furthermore, the Missouri Court of Appeals held that remanding the cause back to the State Circuit Court because the state failed to establish the requisite statutory requirements for sentence enhancement did not invoke the Double Jeopardy Clause. ***State v. Bohlen***, 698 S.W.2d 577, 578 (Mo.App. 1985). The holding is consistent with that of the New York court's in ***State v. Hunt***, 579 N.E.2d 208 (N.Y. 1991), *cert. denied*, 112 S.Ct. 432 (1991).

Moreover, the Eighth Circuit's extension of ***Bullington v. Missouri***, *supra*, to non-capital enhancement proceedings should be barred under the implications of ***Teague v. Lane***, 489 U.S. 288 (1989). Since the present case comes before the court on collateral review, retroactivity is an issue that must be addressed. ***Graham v. Collins***, 113 S.Ct. 892, 897 (1993). This Court has never

extended ***Bullington*** to non-capital sentence proceedings. To the contrary, the issue was not addressed in ***Bullington***, and was expressly reserved in ***Lockhart v. Nelson***, *supra*, 488 U.S. at 37 n.6. Although the Court of Appeals held that the Missouri state court's determination that Double Jeopardy Clause does not apply to non-capital sentencing proceedings was irrelevant, the Missouri courts made a " 'reasonable, good-faith interpretation of existing precedents' ". ***Lockhart v. Fretwell***, 113 S.Ct. 838, 844 (1993), *quoting* ***Butler v. McKellar***, 494 U.S. 407, 414 (1990). The Court of Appeals finding that the state court's opinion was "mistaken" is irrelevant since the Missouri Court made a reasonable, good-faith interpretation of existing precedent. ***Teague*** protects state court judgments based on reasonable, good faith interpretation of federal law, even though those interpretations later prove incorrect.

The Court of Appeals' holding that "[e]xtending ***Bullington*** to non-capital sentencing enhancement hearings is not a sufficient stretch to cause it to be a new rule under ***Teague***" is erroneous. The mere fact that the Court of Appeals "stretch[ed]" ***Bullington*** is in itself sufficient to show it created a new rule. Of course, the lower court's "stretch" analysis is improper ***Teague*** analysis. Rather, the Court of Appeals should have examined the legal landscape from this Court to determine if respondent were requesting the Court of Appeals to create new law. ***Graham v. Collins***, 113 S.Ct. at 898. The survey of ***Bullington*** and ***Lockhart v. Nelson*** shows respondent's request for the application of "new law".

How can the Court of Appeals condemn the state court for failing to apply ***Bullington*** to non-capital enhancement proceedings when that court had to "stretch" the holding in ***Bullington*** to achieve this result? The Court of Appeals could not establish that this Court has applied ***Bullington*** to non-capital enhancement proceedings; nonetheless, the Court of Appeals went ahead and extended the ***Bullington*** standard to non-capital sentence enhancement proceedings. In doing so, it rejects this Court's principle of retroactivity. While this Court has granted certiorari in ***Gilmore v. Taylor***, 113 S.Ct. 52 (1992) to define "new law", the principle of ***Teague***, that the state should not be penalized for following "the constitutional standard that prevailed at the time the original proceedings took place," ***Teague***, *supra*, at 306, does not justify denying finality of respondent's criminal conviction eight years later.

II.

WHETHER THIS COURT'S DECISION IN BULLINGTON V. MISSOURI, 451 U.S. 430 (1981) EXPANDS THE PROTECTION AFFORDED BY THE DOUBLE JEOPARDY CLAUSE CONTRARY TO THE ORIGINAL INTENT OF THE CLAUSE AS ARTICULATED BY THE FRAMERS OF THE CONSTITUTION AND BEYOND THE TRADITIONAL PROTECTIONS OF THE CLAUSE.

The application of the Double Jeopardy Clause to capital sentencing proceedings in ***Bullington v. Missouri***, 451 U.S. 430 (1981) should be reconsidered and reversed because it contradicts all previous precedents of this court.[2] Until ***Bullington***, this court never applied double jeopardy to sentencing decisions after retrial. Although the ***Bullington*** court may have been inclined to do so because "death is different", that rationale is grounded in the Eighth Amendment prohibition against cruel and unusual punishments, not the Double Jeopardy Clause.

This court's holding in ***Bullington*** clearly contradicts previous holdings in ***North Carolina v.***

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[2]The issue of whether ***Bullington*** remains good law should be reached only if the Court decides under question I that ***Bullington's*** Double Jeopardy Clause analysis is applicable to non-capital sentence enhancement proceedings.

Pearce, 395 U.S. 711 (1969) and ***United States v. DiFrancesco***, 449 U.S. 117 (1980). Although ***Bullington*** was distinguished from these cases because of the procedures employed during the sentencing proceedings, the analytical "difference is immaterial for the purposes of the Double Jeopardy Clause." ***Bullington v. Missouri***, 451 U.S. at 448 n.2 (Powell, J. dissenting). Simply because the first jury declined to impose the death penalty does not establish that the state failed to prove its case. Such analysis could be equally applicable to cases in which the second jury on remand in a non-capital case imposed a harsher sentence than the first jury, a situation which has been consistently allowed by this court. ***Stroud v. United States***, 251 U.S. 15 (1919).

Application of the Double Jeopardy Clause should not depend on the procedural niceties established by each State. A State could establish a capital or non-capital sentencing scheme that has a full range of sentences, not just the life imprisonment or death option in ***Bullington***. A state need not provide for jury sentencing. ***Clemons v. Mississippi***, 494 U.S. 738 (1990). The constitutional minimum required by this Court in ***Graham v. Collins***, 113 S.Ct. at 915-17 (Stevens, J. dissenting) could be utilized by a State without invoking the procedures rationale of ***Bullington***. The phrase "death is different" does not explain the procedures rationale in ***Bullington***.

As Justice Powell points out in his dissent in ***Bullington***, "[u]nderlying the question of guilt or innocence is an objective truth", 451 U.S. at 450.

The sentencer's function is not to establish the facts underlying the conviction, but rather to determine the punishment the jury sees fit. *Id.* This punishment is subjective and lies within the discretion of the sentencer. As long as the punishment imposed is within the allowable statutory range, the sentence cannot be determined erroneous.

The question is not whether the sentencing proceedings resembles a trial, but rather "whether the reasons for considering an acquittal on guilt or innocence as absolutely final apply equally to a sentencing decision imposing less than the most severe sentence authorized by law." *Id.* The past precedent of this court has clearly held that the Double Jeopardy Clause does not attach to sentencing decisions even if a defendant receives a greater sentence on retrial. In fact, this court itself said that there are "fundamental distinctions between a sentence and an acquittal, and to fail to recognize them is to ignore the particular significance of an acquittal." ***United States v. DiFrancesco***, 449 U.S. at 133.

The Double Jeopardy Clause applies to guilt or innocence because it prevents the possibility of a defendant's being tried after acquittal. "A retrial of a defendant once found to have been innocent 'enhanc[es] the possibility that even though innocent he may be found guilty.'" ***Bullington v. Missouri***, 451 U.S. at 451 (Powell, J. dissenting), *quoting* ***Green v. United States***, 355 U.S. at 188. Of course, this concern is *de minimis* given the extra

constitutional protections from the Eighth Amendment that are guaranteed by state and federal courts. Further, the States generally provide state-law procedural protections, guaranteed by the State courts, beyond the constitutional minimum. In these circumstances, the concerns of the Clause are not necessary.

The possibility of a higher sentence after retrial has been previously accepted by this court as "a legitimate concomitant of the retrial process." ***Chaffin v. Stynchcombe***, 412 U.S. 17 (1973). Therefore, this court's departure from that standard should be corrected by overruling the decision in ***Bullington***.

CONCLUSION

Petitioner respectfully requests this court to issue a writ of certiorari to the United States Court of Appeals for the Eighth Circuit and reverse the judgment of that Court.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

STEPHEN D. HAWKE
Assistant Attorney General
Counsel of Record

FRANK A. JUNG
Assistant Attorney General
Of Counsel

Post Office Box 899
Jefferson City, MO 65102
(314) 751-3321

Attorneys for Petitioners

92-1500

No. 92-_____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1992

PAUL CASPARI, Superintendent of the Missouri Eastern Correctional Center, and JEREMIAH W. (JAY) NIXON, Attorney General of Missouri,
Petitioners,
v.
CHRISTOPHER BOHLEN,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

APPENDIX

JEREMIAH W. (JAY) NIXON
Attorney General, State of Missouri

STEPHEN D. HAWKE
Assistant Attorney General
Counsel of Record

FRANK A. JUNG
Assistant Attorney General
of Counsel
P.O. Box 899
Jefferson City, MO 65102
(314) 751-3321
Attorneys for Petitioners

106 pp

IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1992

CHRISTOPHER BOHLEN,	)
	)
Respondent,	)
vs.	)
	)
PAUL CASPARI, AND	)
JEREMIAH W. (JAY) NIXON,	)
	)
Petitioner.	)

INDEX TO PETITIONER'S APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 91-3360EMSL

Christopher Bohlen	•
	•
Appellant,	•
	• Appeal from the
v.	• United States
	• District Court
	• for the Eastern
Paul Caspari, and	• District of
WILLIAM WEBSTER,	• Missouri.
	•
	•
Appellees.	•

After consideration, the court hereby grants Bohlen's motion to amend judgment. Part III of the opinion entitled "CONCLUSION" shall be amended to delete the language "a writ of habeas corpus directing the Missouri circuit court to resentence Bohlen without application of the persistent offender statute" and substitute "a conditional writ of habeas corpus consistent with this opinion. See Cokeley v.

Lockhart, 951 F.2d 916,921 (8th Cir. 1991), cert. denied, 113 S.Ct. 296 (1992)."

December 11, 1992

Order Entered at the Direction of the Court:

--Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth

Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 91-3360

Christopher Bohlen	•
	•
Appellant,	•
	• Appeal from the
v.	• United States
	• District Court
	• for the Eastern
Paul Caspari, and	• District of
WILLIAM WEBSTER,	• Missouri.
	•
Appellees.	•

Submitted: June 9, 1992

Filed: October 16, 1992

Before JOHN R. GIBSON, Circuit Judge, HEANEY, Senior Circuit Judge, and BEAM, Circuit Judge.

BEAM, Circuit Judge.

Christopher X. Bohlen appeals the denial of his habeas corpus petition by the district court. Bohlen argues that he was subject to double

jeopardy at a resentencing hearing where the state was given a second chance to prove that he is a persistent offender under Missouri law. Finding that double jeopardy protections apply to persistent offender sentencing proceedings in Missouri, we reverse.

I. BACKGROUND

Bohlen, on July 1, 1982, was convicted by a jury in the Circuit Court of St. Louis County, Missouri, on three counts of first degree robbery. On October 15, 1982, the trial court sentenced him as a persistent offender to three consecutive fifteen-year terms in prison. The record shows that no evidence of prior convictions was presented either at trial or at the sentencing hearing to prove that Bohlen was a persistent offender.

On direct appeal, the Missouri Court of Appeals affirmed the conviction, but reversed and remanded for a hearing on the state's allegations of prior convictions and for resentencing if the state could prove Bohlen's persistent

offender status beyond a reasonable doubt. State v. Bohlen, 670 S.W.2d 119, 123 (Mo. Ct. App. 1984). At the resentencing hearing, the state introduced evidence of four prior felony convictions. The trial court determined that Bohlen was a persistent offender, and again sentenced him to three consecutive fifteen-year terms. On direct appeal of the second sentence, the Missouri Court of Appeals affirmed, holding that the question of double jeopardy was not involved because double jeopardy protections do not apply to sentencing. State v. Bohlen, 698 S.W.2d 577, 578 (Mo. Ct. App. 1985).

On September 5, 1989, Bohlen filed the present petition for a writ of habeas corpus under 28 U.S.C. § 2254. Bohlen's petition alleged, among other things, that he was subjected to double jeopardy when the state was allowed to introduce evidence of prior convictions at the second sentencing hearing. The magistrate judge recommended that relief be denied. Bohlen v. Caspari, No. 89-1651-C (4), Report and Recommendation of the Magistrate Judge (E.D. Mo. August 14, 1991). According to the magistrate judge, jeopardy did not

attach at the first sentencing hearing because the hearing lacked the hallmarks of an adversarial trial. Id. at 13. Thus, the second sentencing hearing did not violate double jeopardy. The district court adopted the magistrate judge's recommendations and denied habeas corpus relief. Bohlen v. Caspari, No. 89-1651-C (4), Order (E.D. Mo. August 28, 1991). Bohlen appeals arguing that the resentencing hearing constituted double jeopardy under the rule announced in Bullington v. Missouri, 451 U.S. 430 (1981).

II. DISCUSSION

The issue in this case is whether the double jeopardy clause of the Fifth Amendment, imposed upon the state through the Fourteenth Amendment, prevents resentencing of a defendant in a non-capital case where an appellate court has reversed the defendant's sentence, under a persistent offender statute, for the state's failure to prove any prior convictions. Since Bohlen is before us on collateral review, we must determine as a threshold matter whether applying the double jeopardy rule in Bullington to a non-capital case would

constitute a "new rule" for purposes of retroactivity.[1] Penry v. Lynaugh, 492 U.S. 302, 313 (1989); Teague v. Lane, 489 U.S. 288, 300-01 (1989); Newlon v. Armontrout, 885 F.2d 1328, 1331 (8th Cir. 1989), cert. denied, 110 S.Ct. 3301 (1990). Under Teague Bohlen may not attack his sentence on federal habeas corpus using a rule of constitutional law established after his sentence became final unless the rule falls into one of two narrow exceptions.[2] Saffle v. Parks, 494 U.S. 484, 494-95

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[1]We have addressed this issue before and found that double jeopardy protection does apply in certain non-capital sentencing proceedings, Nelson v. Lockhart, 828 F.2d 446, 449 (8th Cir. 1987), reversed on other grounds sub nom. Lockhart v. Nelson, 488 U.S. 33, 37-38 n.6 (1988). However, Nelson v. Lockhart was decided after Bohlen's sentence became final and thus is not applicable under Teague if it is a new rule. Accordingly, we discuss whether Bullington applies in non-capital caes from the perspective of a state court sitting at the time Bohlen's conviction became final, without the benefit of Nelson v. Lockhart.

[2]Teague and its progeny speak in terms of the date of conviction instead of the date of sentencing. Since Bohlen does not attack the constitutionality of his underlying conviction, however, the relevant date for purposes of our inquiry is the date his sentence became final. See Stringer v. Black, 112 S.Ct. 1130, 1136 (1992).

(1990); Teague, 489 U.S. at 311-13. Since we find that extending double jeopardy protection to the Missouri persistent offender sentencing procedure is not a new rule for retroactivity purposes, we do not address the application of the two exceptions here.

A. New Rule Analysis

The Supreme Court has defined a new rule as one which "breaks new ground or imposes a new obligation on the States or the Federal Government," or, "[t]o put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's [sentence] became final." Teague, 489 U.S. at 301. The Court noted that "[i]t is admittedly often difficult to determine when a case announces a new rule." Id. Difficulties inevitably arise in attempting to distinguish application of a new rule from application of a well-established constitutional principle to a case which is analogous to those considered in prior case law. Penry, 492 U.S. at 314. A rule is not new if "a state court considering [petitioner's] claim at the time his [sentence]

became final would have felt compelled by existing precedent to conclude that the rule [petitioner] seeks was required by the Constitution." Saffle, 494 U.S. at 488.

Bohlen's sentence became final on August 20, 1985, when the Missouri Court of Appeals affirmed his sentence after remand. State v. Bohlen, 698 S.W.2d 577 (Mo. Ct. App. 1985). Since Burks v. United States, 437 U.S. 1 (1978) and Bullington v. Missouri, 451 U.S. 430 (1981), were decided before his sentence became final, Bohlen is entitled to the benefit of those decisions under the retroactivity principles announced in Griffith v. Kentucky, 479 U.S. 314 (1987).

In Burks, the Supreme Court held that the double jeopardy clause forbids retrial of a defendant whose conviction is overturned by an appellate court because of insufficiency of the evidence at trial. Burks, 437 U.S. at 16. According to the Court, the reversal for insufficient evidence is tantamount to an implicit acquittal by the trial court. Id. at 18. In Bullington, the Court extended this principle to a death penalty sentence enhancement hearing. Bullington, 451 U.S. at 442-443. The

defendant in Bullington was convicted of capital murder and sentenced by the jury after an enhancement hearing to life in prison rather than death, the other alternative under the Missouri statute. After the verdict and sentence, Bullington successfully moved for a new trial. The state then gave notice that it intended to seek the death penalty for a second time. Bullington claimed that the double jeopardy clause barred the imposition of the death penalty because the first jury had declined to impose a death sentence. The Missouri Supreme Court found no double jeopardy implications. The United States Supreme Court reversed.

The Court reasoned that although "[t]he imposition of a particular sentence usually is not regarded as an 'acquittal' of any more severe sentence that could have been imposed," Bullington, 451 U.S. at 438, "[b]y enacting a capital sentencing procedure that resembles a trial on the issue of guilt or innocence, . . . Missouri explicitly requires the jury to determine whether the prosecution has 'proved its case.'" Id. at 444. Under these circumstances, because the jury had failed to find

"whatever was necessary" to sentence Bullington to death, imposition of the life sentence acted as an implicit acquittal of the death penalty. Thus, the double jeopardy clause protected Bullington from being subjected to a new hearing where the death penalty might be imposed.

The Court found it significant in deciding to invoke the double jeopardy protection that, unlike usual sentencing procedures in which the "sentencer's discretion [is] essentially unfettered," id. at 439, the Missouri capital sentencing procedure required a separate hearing where the jury was presented with a choice between two alternatives and standards to guide them in making that choice. Id. at 438. The prosecution was not allowed to simply recommend appropriate punishment, but "undertook the burden of establishing certain facts beyond a reasonable doubt in its quest to obtain the harsher of the two alternative verdicts."[3]

[3]The Court found that use of the reasonable doubt standard indicated that it was the state, not the defendant, that should bear almost the entire risk of error. Bullington, 451 U.S. at 446.

Id. The Court held that these statutory protections made the Missouri capital sentencing proceed ing unlike ordinary sentencing proceedings to which the double jeopardy clause does not apply. See North Carolina v. Pearce, 395 U.S. 711, 720 (1969).[4] The capital sentencing proceeding in Bullington was so similar to a trial on the issue of guilt that Bullington was entitled to double jeopardy protection. Thus, the Court applied the rule announced in Burks--that a defendant may not be retried if he obtains a reversal of his conviction for insufficiency of the evidence--to Bullington.

The persistent offender sentencing enhancement

[4]The state argues that "the continuing vitality of Bullington is open to question since it has no foundation in the rationales discussed in North Carolina v. Pearce." Appellee's Brief at 11. This argument appears to put the cart before the horse since Bullington was decided after Pearce and carved out a specific exception to the rationale of Pearce. Bullington distinguished Pearce because, among other reasons, "there was no separate sentencing proceeding at which the prosecution was required to prove--beyond a reasonable doubt or otherwise--additional facts in order to justify the particular sentence." Bullington, 451 U.S. at 429.

procedure in Missouri has protections similar to those in the capital sentencing hearing in Bullington. A persistent offender is a person who has pleaded guilty to or has been found guilty of two or more felonies committed at different times. Mo. Rev. Stat. § 558.016.3 (1986). In order for the court to find that a defendant is a persistent offender, (1) the charging document must plead all essential facts warranting a finding that the defendant is a persistent offender; (2) evidence must be introduced by the state to establish that the facts as pleaded warrant a finding beyond a reasonable doubt that the defendant is a persistent offender; and (3) the trial court must make findings of fact that warrant a finding beyond a reasonable doubt that the defendant is a persistent offender. Id. § 558.021.1. At the hearing on persistent offender status, the defendant has rights of confrontation, cross-examination, and the opportunity to present evidence. Id. §558.021.4. Persistent offender status greatly affects the defender's rights. A finding by the court that the defendant is a persistent offender deprives the defendant of the opportunity to be

sentenced by a jury, id. §§ 557.036.2; 558.016.1, and subjects the defendant to the possibility of a greater term of imprisonment. Id. § 558.016.1.

The state argues that Bullington does not extend to non-capital cases. According to the state's argument, application of double jeopardy protection to capital sentencing was compelled because capital sentencing involves "additional sensitivities created by the Eighth Amendment" not present in persistent offender enhancement hearings. Appellee's Brief at 11. The language of Bullington belies this assertion. Nowhere in Bullington does the majority rely on Eighth Amendment concerns to support its holding. In his dissent, Justice Powell explicitly recognizes the scope of the majority rule, noting that "[t]he Court does not purport to justify its conclusion with the argument that facing the death sentence a second time is more of an ordeal in the legal sense than facing any other sentence a second time." Bullington, 451 U.S. at 451 (Powell, J., dissenting). According to its plain language, Bullington is applicable to any sentencing procedure that is sufficiently

similar to a trial of guilt or innocence to implicate the double jeopardy clause.

Accordingly, we find that Bullington dictates that the implicit acquittal rationale of Burks must apply to the Missouri persistent offender sentencing scheme to bar a second enhancement hearing where there has been a finding of insufficient evidence of persistent offender status.[5] Missouri

[5]The district court adopted the magistrate's reasoning that in this instance jeopardy did not attach in the first hearing because there were no disputed issues, no new evidence or witnesses were presented (other than allocution), there were no opening or closing statments made by either party, and the reasonable doubt standard was not employed. Bohlen v. Caspari, No. 89-1651-C (4), Report and Recommendation of the Magistrate Judge at 13 (E.D. Mo. August 14, 1991). The magistrate judge noted that "[i]n fact, the prosecutor remained silent throughout most of the proceeding." Id. This reasoning does not follow from double jeopardy jurisprudence. If the state were to proceed to trial in a criminal case, and after the jury was sworn presented no evidence or witnesses, further prosecution would be prohibited." Crist v. Bretz, 437 U.S. 28, 35 (1978); State v. Fitzpatrick, 676 S.W.2d 831, 834 (Mo. 1984) (en banc). Missouri's statutory requirements for persistent offender hearings are clear. The state cannot defeat a double jeopardy claim by showing that it totally failed to sustain its

considers persistent offender sentencing serious enough to set up a statutory enhancement procedure with protections similar to a trial on guilt or innocence. That procedure is sufficiently similar to trial procedures that it triggers double jeopardy protection. In a persistent offender hearing, the trial court has two alternatives: to find that the defendant is a persistent offender beyond a reasonable doubt or not. The outcome of this decision greatly affects the possible length of defendant's sentence. By placing the burden of proof beyond a reasonable doubt on the state, Missouri has indicated that the state should bear most of the risk of error. It is a hallmark of our system of jurisprudence that "the State with all its resources and power should not be al lowed to make repeated attempts to convict an individual for an alleged offense." Green v. United States, 355 U.S. 184, 187 (1957). After Bullington, it is a short step to apply the same double jeopardy protection to a non-capital sentencing hearing as the Supreme Court applied to a capital

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burden of proof.

sentence enhancement hearing. The rule is not new. Accordingly, Teague does not bar Bohlen from reliance on the double jeopardy principles announced in Bullington.

B. Reasonableness Determination

The state argues that even if we find Bullington controlling, we should give deference to the Missouri Court of Appeals' rejection of the Bullington rule in a non-capital case because it was reasonable under the jurisprudence at the time Bohlen's sentence became final. In support of this argument the state asserts that there is currently a split among the federal circuits on the issue of whether Bullington applies in non-capital cases and that Missouri courts have held that the persistent offender statute does not implicate double jeopardy.[6]

The principles of Teague serve to ensure that "gradual

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[6]The state also distinguishes the present case from Bullington because the persistent offender decision here was made by the judge, not a jury. This distinction does not affect the determination of whether Bullington applies in non-capital cases. See Stringer, 112 S.Ct. at 1138-39; Fong Foo v. United States, 369 U.S. 141, 143 (1962).

developments in the law over which reasonable jurists may disagree are not later used to upset the finality of state convictions valid when entered." Sawyer v. Smith, 497 U.S. 227, 234 (1990). The Supreme Court extended this principle recently, holding that "a federal habeas court 'must defer to the state court's decision rejecting the claim [under its interpretation of existing law] unless that decision is patently unreasonable.'" Wright v. West, 112 S.Ct. 2482, 2490 (1992) (quoting Butler v. McKellar, 494 U.S. 407, 422 (1990) (Brennan, J., dissenting)). Reasonableness in this context is an objective standard. Stringer v. Black, 112 S.Ct. 1130, 1140 (1992). Thus, the ultimate decision whether precedent at the time Bohlen's sentence became final dictated application of the double jeopardy clause to the Missouri persistent offender hearing is based on our objective reading of Bullington.

In this case, as indicated, the state argues that there is a split among the circuits which shows that reasonable jurists could disagree over whether Bullington applies in non-capital cases. Thus, the state argues, the Missouri appellate court

acted reasonably when it denied Bohlen double jeopardy protection. The state notes additionally that the Supreme Court has not yet commented on the availability of Bullington in non-capital proceedings. See Lockhart v. Nelson, 488 U.S. 33, 37-38 n.6 (1988) (declining to address the issue because the Eighth Circuit held that Bullington does apply in non-capital cases and the state conceded the issue in its brief and at oral argument); Hunt v. New York, 112 S.Ct. 432 (1991) (White, J., dissenting from denial of certiorari).

We note initially that the apparent split among the circuits may in fact be illusory. In Lockhart v. Nelson, the Court, assuming that Bullington applies to non-capital cases, held that double jeopardy does not apply to enhancement proceedings where the sentence is reversed due to trial error, not insufficient evidence. Lockhart v. Nelson, 488 U.S. at 39. In both federal cases relied on by the state as barring double jeopardy protection in sentencing enhancement proceedings, the holdings were ultimately based on trial error. See Linam v. Griffin, 685 F.2d 369, 374 (10th Cir. 1982) (double jeopardy

does not bar resentencing when evidence is incorrectly excluded), cert. denied, 459 U.S. 1211 (1983); Denton v. Duckworth, 873 F.2d 144, 148 (7th Cir.) (under Lockhart v. Nelson, double jeopardy does not apply where evidence initially introduced was sufficient, even if some of it was introduced erroneously), cert. denied, 493 U.S. 941 (1989). See also Tate v. Armontrout, 914 F.2d 1022, 1026 (8th Cir. 1990) (distinguishing a total failure of proof from situations where sufficient evidence was produced, but erroneously excluded). Appellant cites no federal holding resting squarely on the proposition that Bullington does not apply to non-capital sentencing enhancement proceedings.

The state's argument that we should defer to the Missouri appellate court because it followed prior Missouri precedent similarly lacks foundation. On direct appeal after resentencing, the appellate court relied on State v. Holt, 660 S.W.2d 735, 739 (Mo. Ct. App. 1983) and State v. Lee, 660 S.W.2d 394, 399 (Mo. Ct. App. 1983) (per curiam), for the proposition that double jeopardy is not implicated when the

court remands for determination of persistent offender status and resentencing. See State v. Bohlen, 698 S.W.2d 577, 578 (Mo. Ct. App. 1985). Holt does not discuss Bullington at all. In Lee, after asserting a split in the circuits, the Missouri Court of Appeals stated that "[i]n all events, this court is constrained to follow the procedure on this issue clearly mandated by the decisions of the Supreme Court of Missouri first cited above." Lee, 660 S.W.2d at 400. All of the Missouri Supreme Court decisions cited by the court were decided before Bullington. See id. at 399. Lee rejected without comment the distinction made in State v. Cullen, 646 S.W.2d 850 (Mo. Ct. App. 1982), between insufficient evidence of persistent offender status and failure of proof due to trial error. See Lee, 660 S.W.2d at 400.

The views of the other federal circuits and of the Missouri courts are relevant to our inquiry into whether the Missouri Court of Appeals decision was a reasonable interpretation of existing precedent, but they are not dispositive. Stringer, 112 S. Ct. at 1140. In Stringer, the Supreme Court found that an objective reading of the relevant precedent

dictated a rule that had been previously rejected by the Fifth Circuit. In answer to the state's argument that the Fifth Circuit decision indicated that reasonable jurists could disagree, the Court responded: "[t]he short answer to the State's argument is that the Fifth Circuit made a serious mistake." Id. As we discussed supra, Bullington dictates that double jeopardy protections are available in sentencing proceedings that bear the hallmarks of a trial on guilt or innocence. To the extent that any of the other federal circuits or the Missouri courts have held to the contrary, we think that they were mistaken. Extending Bullington to non-capital sentencing enhancement hearings is not a sufficient stretch to cause it to be a new rule under Teague. Accordingly, we hold that the Missouri Court of Appeals' decision denying Bohlen double jeopardy protection on remand was unreasonable under the precedent existing at the time Bohlen's sentence became final. We emphasize that in this is not a case of trial error, but a total failure of proof.[7]

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[7]The state suggested at oral argument that evidence of prior convictions might have been

"Having received 'one fair opportunity to offer whatever proof it could assemble,' Burks v. United States, 437 U.S. at 16, the State is not entitled to another." Bullington, 451 U.S. at 446.

III. CONCLUSION

For the reasons discussed above, the decision of the district court is reversed and the case shall be remanded with directions for the district court to enter a writ of habeas corpus directing the Missouri circuit court to resentence Bohlen without application of the persistent offender statute.

A true copy.

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offered at the first hearing, but was erroneously omitted from the record. Our review of the transcripts belies this assertion. In any event, the state was given ample opportunity to complete the record on Bohlen's direct appeal:

> Our search of the record indicates that although the defendant was sentenced by the judge as a persistent offender no proof was made of the prior convictions. We requested the parties to supplement the record to prove that the prior convictions were presented to the court. No such proof was furnished.

State v. Bohlen, 670 S.W.2d 119, 123 (Mo. Ct. App. 1984).

Attest:

CLERK, U. S. COURT OF APPEALS,

EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

CHRISTOPHER X. BOHLEN,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 89-1651C(4)
	)	
PAUL CASPARI, et al.,	)	
	)	
Respondents.	)	

ORDER

The Court has carefully considered petitioner's request for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, the Report and Recommendation of the United States Magistrate concerning said request, and petitioner's objections and incorporated suggestions. Wherefore,

IT IS HEREBY ORDERED that the Report and Recommendation of the United States Magistrate be and it is sustained and adopted as the order of this Court.

IT IS FURTHER ORDERED that petitioner's request for a writ of habeas corpus is denied for the reasons set forth in that report and recommendation.

Dated this --28th-- day of August, 1991.

–Clyde S. Cahill --

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

CHRISTOPHER X. BOHLEN,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 89-1651C(4)
	)	
PAUL CASPARI, et al.,	)	
	)	
Respondents.	)	

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

This action is before the Court on the petition of Missouri state prisoner Christopher X. Bohlen for a writ of habeas corpus under 28 U.S.C. §2254. This matter was referred to the undersigned United States Magistrate Judge for review and a recommended disposition. 28 U.S.C. §636(b).

On July 1, 1982, petitioner Christopher X. Bohlen was convicted of three counts of first degree robbery in the Circuit Court of St. Louis County. He

was sentenced on October 15, 1982 as a persistent offender to three consecu tive 15-year terms of imprisonment. Petitioner is presently incarcerated at the Missouri Eastern Correctional Center located in Pacific, Missouri.

Petitioner's convictions and sentences were affirmed on direct appeal. State of Missouri v. Bohlen, 670 S.W.2d 119 (Mo. App. 1984); State of Missouri v. Bohlen, 698 S.W.2d 577 (Mo. App. 1985). He subsequently sought collateral post-conviction relief under Missouri Supreme Court Rule 27.26. (Resp. Exh. K, L.) The motion court's denial of relief was upheld on appeal. Bohlen v. State of Missouri, 743 S.W.2d 425 (Mo. App. 1987).

On September 5, 1989, petitioner filed the instant petition for a writ of habeas corpus alleging 11 grounds for relief. The undersigned reviewed the writ and recommended it be dismissed without prejudice because peti tioner presented a "mixed

petition" containing both exhausted and unexhausted grounds. (Report and Recommendation filed December 18, 1990.) The Court must dismiss the entire petition when the habeas petitioner fails to exhaust all grounds and adequate state remedies remain available unless the petitioner voluntarily deletes the unexhausted grounds from his petition. Rose v. Lundy, 455 U.S. 509, 522 (1982).

On January 9, 1991, petitioner voluntarily deleted his unexhausted habeas grounds 1, 5, 7, 9, 10 and the due process portion of ground 11 and sought relief in federal court for his fully exhausted habeas grounds. The remaining grounds for habeas relief alleged by petitioner are six: (a) he was deprived of due process and a fair trial because the prosecutor improperly referred to matters outside the record during closing argument (original ground 2); (b) he was deprived of due process and a fair trial because the trial judge failed to declare a mistrial

after the prosecutor improperly argued facts not in evidence during closing argument (original ground 3); (c) he was denied his right to confront and cross-examine witnesses against him (original ground 4); (d) he was subjected to double jeopardy when the state was allowed to adduce additional evidence at a second enhancement proceeding (original ground 6); (e) his trial counsel was ineffective for failing to investigate and assert an alibi defense (original ground 8); and (f) his trial counsel was ineffective for failing to object to the prosecutor's demonstration at trial (original ground 11).

Petitioner's grounds (a) and (b) for relief allege the prosecutor's improper remarks during closing argument and the trial judge's failure to declare a mistrial after such remarks violated his right to a fair trial and due process guaranteed by the Fifth and Fourteenth Amendments.

At trial the prosecution sought to prove that

Bohlen, with others, robbed the Blust Jewelry Store in Overland, Missouri. Most of the state's evidence came from four eyewitnesses (Winbermuehle, Le Roy, Robertson and Long) who observed the robbery for periods ranging from a few seconds to a minute. Two eyewitnesses (Robertson and Long) positively identified petitioner as one of the robbers. The others (Winbermuehle and Le Roy) could not. The state also produced a jewelry tag, a lighter, and a ski mask, all of which were allegedly associated with the robbery (State Exhs. 1, 3, 5).

The defense called three eyewitnesses (O'Dell, Dempsey and Taxman) who were unable to identify petitioner as a participant in the crime, though none of the witnesses could testify he was not one of the participants.

The evidentiary portion of the trial lasted three days and on the final day during closing argument for the state, the prosecuting attorney improperly

argued the law and the court sustained defense counsel's objection. (Tr. 325-26). The prosecutor pursued a new course and argued he did not have possession of a film[1] depicting the robbery and even if he had, it would not be revealing. (Tr. 326.) Defense counsel again successfully objected. Finally, the prosecutor blurted, "There is no film."

Defense counsel objected to the prosecutor's statements concerning the film and the court ordered a side bar conference. (Tr. 326.) In proceedings outside the hearing of the jury, defense counsel requested a mistrial and the trial judge responded, "I'll grant it." (Tr. 327.) In an attempt to preserve the

[1]The prosecutor was referring to a film retrieved from a surveillance camera inside the jewelry store. (Tr. 124.) Mr. Winbermuehle gave the film, which depicted the robbery, to officers from the Overland Police Department. (Tr. 125.) The witnesses later viewed the film, but it was not helpful for identification purposes. (Tr. 135.) Some time prior to trial the film was destroyed and was never prodcued as evidence. (Tr. 326.)

proceedings the prosecutor explained his interpretation of the objections and suggested the court admonish him and strike his offending statements from the record. (Tr. 327-28.) The trial judge did not grant a mistrial, but instructed the jury to disregard the prosecutor's last comment. (Tr. 328.)

The adversary system permits and encourages prosecutors to "prosecute with earnestness and vigor". United States v. Young, 470 U.S. 1, 7 (1985) (quoting, Berger v. United States, 295 U.S. 78, at 88 (1935)). Courts recognize that in the heat of argument a prosecutor may occasionally make remarks prejudicial to the accused which are not supported by evidence. Id., at 10.

When a federal court in a habeas proceeding reviews allegations of improper comments made by a prosecutor, the standard of review is very narrow. Darden v. Wainwright, 477 U.S. 168, 181 (1985). All

relevant factors must be considered before a conviction may be overturned. Young, supra, 470 U.S. at 11. It is not enough to overturn a conviction that the prosecutor makes undesirable or unacceptable remarks. Darden, supra, 477 U.S. at 181. The relevant question is whether the prosecutor's comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id., (quoting, Donnelly v. DeChristoforo, 416 U.S. 637, at 643 (1974)).

When an error occurs a trial judge can take corrective measures to remedy the proceedings. Prompt action by the presiding judge in the form of corrective instructions to the jury or an admonishment of the offending attorney may be sufficient to correct an errant prosecutor's remarks. Young, supra, 470 U.S. at 13.

In the present case the prosecutor's remarks and the judge's denial of defendant's motion for a

mistrial are not of a constitutional magnitude which require reversal. It is not disputed that the prosecuting attorney's remarks constituted error, but those remarks did not so infect the trial with unfairness that due process was lacking. The remarks were isolated.

The judge initially indicated his desire to grant a mistrial due to the erroneous remarks, but on reflection chose another, less drastic remedy. The judge ordered the jury to disregard the prosecutor's last statement. (Tr. 328.) This prompt action was sufficient to correct any prejudice resulting from the prosecutor's closing argument and afforded defendant a fair trial. Petitioner's federal habeas grounds (a) and (b) should be denied.

Petitioner's ground (c) alleges his right to confront and cross-examine a witness against him was denied. In the indictment, the state charged petitioner with three counts of first degree robbery.

The third count was for stealing a wristwatch owned by Minerva Pastor. (Indictment, Exh. B.) The state never called Ms. Pastor to testify, but sought to prove the crime through the testimony of Steve Winbermuehle, the jewelry store manager. Mr. Winbermuehle testified that a gunman ordered the employees to remove their wristwatches. (Tr. 105.) Mr. Winbermuehle removed his and then helped Ms. Pastor do the same. (Tr. 105). This testimony was the only evidence the state presented to prove the third count of first degree robbery.

The Confrontation Clause of the Sixth Amendment is made applicable to the states by the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, 403 (1965). The Confrontation Clause allows a defendant the opportunity to cross-examine hostile witnesses to assess the truthfulness of their testimony. Ohio v. Roberts, 448 U.S. 56, 63-64 (1980). It is not affected when the government fails

to call a potential witness. United States v. Polisi, 416 F.2d 573, 579 (2nd Cir. 1969). A state, in a criminal proceeding, is not required to call each and every witness who may be able to provide testimony, State of Missouri v. Smith, 632 S.W.2d 3, 5 (Mo. App. 1982), but it may make strategic decisions and select those witnesses who will enhance the prosecution's case.

Steve Winbermuehle testified that a gunman took Ms. Pastor's wristwatch. Defense counsel had an opportunity to and did cross-examine Mr. Winbermuehle to attack his credibility and truthfulness. Since Ms. Pastor did not testify, petitioner's right to cross-examine her was not violated. Petitioner's ground (c) should be denied.

Petitioner's ground (d) alleges he was subject to double jeopardy when the state was allowed to adduce additional evidence at a second sentencing proceeding.

On October 15, 1982, petitioner appeared before Circuit Judge Milton Saitz to be sentenced for the three convictions of first degree robbery. (Exh. A, p. 336). At the sentencing hearing petitioner's attorney supplemented his motion for a new trial. (Exh. A, pp. 336-337.) He then spoke before Judge Saitz on behalf of his client to present potentially mitigating circumstances relevant to sentencing. (Exh. A, p. 339.) Petitioner likewise spoke in an attempt to mitigate his sentence. (Exh. A, pp. 339-340). The prosecution declined to comment or present new evidence. (Exh. A, p. 340.) Judge Saitz, having heard all the testimony, declared petitioner a persistent offender and sentenced him to an enhanced sentence of three consecutive 15-year prison terms. (Exh. A, p. 341).

For a judge to classify an individual as a persistent offender, the state must prove beyond a reasonable doubt that the defendant "pleaded guilty

or has been found guilty of two or more felonies committed at different times." §558.016(3) R.S.Mo.

Petitioner appealed the enhanced sentence on the ground that the state presented insufficient evidence to classify him as a persistent offender. The Missouri Court of Appeals could not find any evidence in the record to show that the state had proven petitioner was a persistent offender. Bohlen, supra, 670 S.W.2d at 123. The court ordered the parties to supplement the record to show that the trial court had received evidence of prior convictions at the time of the initial sentencing hearing. Id. Because there was no record the state had produced such evidence, the Court of Appeals remanded the case for a second sentencing hearing to determine whether petitioner deserved persistent offender status. Id.

During the resentencing hearing, the prosecution presented evidence that petitioner had

committed four previous felonies. (Exh. F, pp. 2-3). Petitioner's attorney advanced several arguments to contradict the state's evidence. (Exh. F, pp. 3-12.) He strongly objected to the introduction into evidence of four prior convictions. (Exh. F, p. 7.) After the presentation of evidence, Judge Saitz adjudged petitioner a persistent offender. (Exh. F, p. 10.) Thereafter, both petitioner and his attorney spoke one final time on his behalf. (Exh. F, pp. 14-15.) At the close of allocution Judge Saitz reinstated the three 15-year consecutive sentences. (Exh. F, pp. 15-16.) The Missouri Court of Appeals affirmed the sentence and held that the double jeopardy prohibition does not apply to sentencing hearings. Bohlen, supra, 698 S.W.2d at 578. Petitioner filed the instant petition for a federal writ of habeas corpus and contests this holding. Upon review, the undersigned believes that the Double Jeopardy Clause was not violated by petitioner's second

sentencing hearing.

The Double Jeopardy Clause of the Fifth Amendment is enforceable against the states through the Fourteenth Amendment. Benton v. State of Maryland, 395 U.S. 784, 787 (1969). Double jeop ardy prohibits a second trial for the same offense after an earlier disposition. Bullington v. Missouri, 451 U.S. 430, 437 (1981). The Double Jeopardy Clause prevents a state from subjecting an individual to "embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity." Green v. United States, 355 U.S. 184, 187-188 (1957). It also prevents the prosecution from "honing its trial strategies and perfecting its evidence through successive attempts at conviction." Tibbs v. Florida, 457 U.S. 31, 41 (1982).

The Supreme Court recently has held that a defendant is protected from double jeopardy in a jury-tried, death penalty, sentence enhancement

proceeding. Bullington, supra, 451 U.S. at 446. In Bullington, a jury convicted defendant of first degree murder. Id., at 432. Under Missouri law, once a defendant is convicted of first degree murder, the issue of punishment is presented to the convicting jury in a bifurcated hearing. §565.006(2), R.S.Mo. (1978). At the hearing the prosecution must prove beyond a reasonable doubt at least one statutorily aggravating circumstance. §565.012(5) R.S.Mo. (1978). After both sides present evidence a jury can select two possible punishments: (1) life imprisonment without parole for at least 50 years; or (2) death. §565.008.1 R.S.Mo. (1978).

At the separate sentencing hearing in Bullington the prosecution presented new evidence of defendant's aggravating circumstances. Bullington, supra, 451 U.S. at 435. Defense counsel did not produce any evidence. Id. After deliberation the jury sentenced defendant to life imprisonment

rather than death. Id., at 435-36. Bullington sucessfully moved for a new trial. Id., at 436. Shortly thereafter the prosecution filed a notice that it intended to seek the death penalty again at the new trial. Id. Petitioner appealed this notice and the Supreme Court held that subjecting him to a possible death sentence after a jury sentenced him to life imprisonment placed him in double jeopardy. Id., at 446.

The Supreme Court reasoned that Missouri's bifurcated capital sentencing hearing so closely resembled a criminal trial that the protection from double jeopardy, which is available at trial, should be available at the separate sentencing hearing. Id. At the sentencing hearing the jury did not sentence Bullington to death, but explicitly selected the lesser sentence of life imprisonment. Id., at 438. This finding was an implicit acquittal of the death penalty. Id., at 445.

The Missouri capital sentencing proceeding has other similarities to a criminal trial: (1) both parties have an opportunity to make opening and closing arguments; (2) both parties may present new evidence subject to the rules of evidence; and (3) a defendant has the right to confront and cross-examine witnesses against him. Id., at 434, 446; §565.006(2) R.S.Mo. (1978).

The Eighth Circuit applied the double jeopardy standard in a case involving non-capital, jury-tried enhancement proceedings. Nelson v. Lockhart, 828 F.2d 446, 449 (8th Cir. 1987), rev'd on other grounds, Lockhart v. Nelson, 488 U.S. 33 (1988). In Nelson the defendant agreed to be sentenced by a jury pursuant to Arkansas' habitual criminal offender act. Id., at 447. The Arkansas habitual offender statute allows a state to give a defendant an enhanced sentence, if a jury finds beyond a reasonable doubt that defendant committed four prior

felonies. Ark. Stat. Ann. §41-1005 (1977). After the prosecution offered evidence of four prior felony convictions at a separate sentencing hearing the jury found defendant to be a habitual offender and sentenced him to 20 years. Id. Unknown to anyone at the time, the defendant had been pardoned of one of the prior offenses. Id., at 448. The petitioner filed a writ of habeas corpus claiming the state produced insufficient evidence to convict him as a persistent offender, because it introduced evidence of a conviction which had been pardoned. The Eighth Circuit agreed and held that the Double Jeopardy Clause applied to enhanced jury-tried sentencing proceedings which are sufficiently similar to a trial on the merits and the second sentencing hearing subjected him to double jeopardy. Id. The Supreme Court reversed and allowed retrial on the ground that admitting the pardoned conviction was a mere trial

error. Lockhart v. Nelson, supra, 488 U.S. at 40.[2]

The Supreme Court did not believe it needed to directly confront the issue whether double jeopardy attached to non-capital, jury-tried, enhanced sentencing proceedings, so it merely assumed it applied. Id., at 37-38 n.6.

The high Court has historically held that double jeopardy attaches to an acquittal, even though "the acquittal was based upon an egregiously

[2]Other courts have had opportunities to decide whether double jeopardy applies to sentencings. The Seventh Circuit held that Double Jeopardy does not apply to Indiana's habitual offender statute. Denton v. Duckworth, 873 F.2d 144 (7th Cir. 1989), cert. denied, ___ U.S. ___, 110 S.Ct. 341 (1989). Compare Benigni v. Hemet, 882 F.2d 356 (9th Cir. 1989) and Bullard v. Estelle, 665 F.2d 1347 (5th Cir. 1982), which hold that double jeopardy prohibits the sentencing of the defendant as a habitual offender at a second trial. The Second and Tenth Circuits have not directly ruled whether double jeopardy applies to enhanced sentencing proceedings but have assumed it may. Linam v. Griffin, 685 F.2d 369 (10th Cir. 1982), cert. denied, 459 U.S. 1211 (1983); Sailor v. Scully, 836 F.2d 118 (2nd Cir. 1987), cert. denied, 486 U.S. 1025 (1988).

erroneous foundation" United States v. DiFrancesco, 449 U.S. 117, 129 (1980), quoting in part, Fong Foo v. United States, 369 U.S. 141, 143 (1962). However, the Court has been reluctant to give these same constitutional protections to sentencing proceedings. Id., at 132. It has stated that there are such fundamental differences between an acquittal and a sentencing hearing that they deserve separate treatment. Id., at 133. "[A] sentence is characteristically determined in large part on the basis of information, such as the presentence report, developed outside the courtroom. It is purely a judicial determination, and much that goes into it is the result of inquiry that is nonadversary in nature." Id., at 136-137.

In the present case, the initial sentencing hearing did not have the hallmarks of an adversary trial on guilt or innocence. There were no disputed issues. No new witnesses or new evidence was

presented. Other than allocution, there were no opening or closing statements made by either party. In fact, the prosecutor remained silent throughout most of the proceeding. This created, for all practical purposes, a non-adversarial proceeding. The "beyond a reasonable doubt" standard was not employed. The sentencing judge could select from a wide range of possible sentences to implement at his discretion.

In contrast, the second sentencing hearing was adversarial in nature. The prosecution was required to present new evidence. There were timely objections and disputed issues. After hearing all the evidence, the judge found "beyond a reasonable doubt" that the petitioner was a persistent offender.

Since jeopardy did not attach to the first sentencing proceeding, the second sentencing hearing did not violate the prohibition against double

jeopardy. Having found no constitutional violation, petitioner's ground d should be denied.

Petitioner's final two grounds for relief ((e) and (f)) allege that his right to effective assistance of counsel was denied when counsel failed to properly investigate and assert an alibi defense, failed to object to an improper demonstration and failed to object to a related closing argument.

A defendant is presumed to have received effective assistance of coun sel unless "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984). Two elements must be satisfied before this claim may succeed. Counsel's performance must fall below an objective standard of reasonableness and the deficient performance must prejudice the defense. Id., at 687.

The proper measure to assess an attorney's performance is whether the effort put forth was reasonable under prevailing professional standards. Id., at 688. In this regard, petitioner must overcome a strong presumption that counsel rendered effective assistance. Id., at 690.

The Missouri Court of Appeals affirmed the trial court's decision that defense counsel rendered effective assistance. Bohlen, supra, 743 S.W.2d at 429. After careful review, the undersigned agrees and believes that counsel's efforts did not deny petitioner the right to a fair trial.

Petitioner first alleges counsel was ineffective for not thoroughly investigating an alibi defense. Petitioner claims he was present at the Maison de Bleu hair salon at the time of the robbery. (Exh. K. p. 5-6.) Petitioner alleges he gave counsel the names of two salon employees who could verify his alibi, Ricky Martin and Neal Cornell (now Cornell

Whitfield). (Exh. K, pp. 4, 33.)

The record shows counsel investigated each and every alibi defense petitioner offered. Counsel contacted the Maison de Bleu hair salon and spoke with an individual whose name he could not recall. (Exh. K, pp. 79-80.) That individual was unable to support petitioner's alibi defense and the investigation of the hair salon ceased. (Exh. K, p. 68.) Counsel contradicted petitioner's testimony and testified that the names of Cornell and Martin were never given to him. Thus, he could not contact them. (Exh. K, pp. 68, 81).

Petitioner next alleges counsel erred when he did not call Leslie Spivey to testify. Ms. Spivey pleaded guilty to participating in the jewelry store robbery and she received a ten-year sentence after a plea bargain. (Exh. K, p. 68). She had also been convicted of several other felonies. (Exh. K, p. 69.)

It is undisputed that counsel drove to

Jefferson City where Ms. Spivey was incarcerated to interview her. (Exh. K, p. 68). She indicated she may have some favorable testimony for petitioner. Id. Counsel believed evidence of the plea bargain and prior felonies would outweigh any aid her testimony could give. (Exh. K, pp. 68-69). Nevertheless, counsel subpoenaed her and she was present at trial in the unlikely event he decided to call her as a witness. (Exh. K, p. 69.)

Counsel made a strategic decision not to call Ms. Spivey to testify. Counselor's strategic decisions made after thorough investigation are virtually unchallengeable, and decisions following less thorough, but nevertheless reasonable, investigations are to be upheld to the extent they are supported by reasonable judgment. Strickland, supra, 466 U.S. at 690-691. Counsel's decision not to call Ms. Spivey to testify did not approach the unreasonableness which warrants habeas corpus relief.

Petitioner next alleges counsel improperly withdrew his initial objection to the prosecutor's improper demonstrative evidence. At trial the prosecutor offered into evidence a hat which was similar in size, shape and color to one of the hats worn during the robbery. (Tr. p. 179.) The prosecutor asked defense counsel to have petitioner try on the hat. Id. Defense counsel objected to the demonstration but subsequently withdrew the objection. Id. Petitioner complied and placed the hat on his head. (Tr. p. 180.)

It is unnecessary to determine whether failing to properly object to the demonstration amounted to error. Even assuming error occurred, petitioner cannot demonstrate he was prejudiced and did not receive a fair trial.

The second prong outlined in Strickland requires there be a reasonable probability that, but for counsel's unprofessional errors, the result of the

proceeding would be different. Strickland, supra, 466 U.S. at 694. A reasonable probability is one so strong that would cause a factfinder to pause and question the outcome. Id., at 494. Thus, an error by counsel cannot set aside a judgment if it had no effect upon it. Id., at 491.

There is little doubt the proceedings would have remained unchanged even if counsel did not allow the demonstration. The record reflects the weight of the evidence was against the petitioner. Two eyewitnesses (Robertson and Lang) independently identified petitioner as a participant in the robbery, both through photos and at trial. (Tr. pp. 159, 161, 178-179). Detectives found a jewelry tag from a ring taken at the Blust Jewelry Store at petitioner's home. (Tr. pp. 15-16.) Police officers also found a Colibri lighter which may have been taken during the robbery hidden between the seats of the squad car in which petitioner traveled. (Tr. pp.

223-224.) With all the evidence presented, it is highly doubtful the verdict would have been different had counsel not withdrawn his objection to the demonstration evidence.

Petitioner finally alleges that counsel's failure to object to the prosecutor's related closing arguments constituted error. The same reasoning stated above concerning grounds (a) and (b) applies here.

Petitioner's grounds (e) and (f) should be denied.

RECOMMENDATION

For the reasons set forth above, it is the recommendation of the undersigned United States Magistrate Judge that the petition of Christopher Bohlen for a writ of habeas corpus be denied without further proceedings.

The parties are advised that they have eleven (11) days in which they may file written objections to

this Report and Recommendation.

--David D. Noce--

UNITED STATES MAGISTRATE

Signed this --14th-- day of August, 1991.

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT
DIVISION SIX

STATE OF MISSOURI,	)No. 49064
	)
Plaintiff-Respondent,	)Appeal from the
	)Circuit Court of
	)St. Louis County
vs.	)Hon. Milton Saitz
	)Judge
CHRISTOPHER BOHLEN,	)OPINION FILED:
	)
Defendant-Appellant.	)August 20, 1985
	)
	)

In State v. Bohlen, 670 S.W.2d 119 (Mo.App. 1984) we affirmed defendant-appellant's conviction on three counts of robbery in the first degree. § 569.020 RSMo 1978. We rejected contentions of error relating to a sixth amendment claim on confrontation of witnesses and that a mistrial had been declared before the jury was permitted to deliberate the charges. There was, however, merit to a contention that the record failed to disclose a hearing and finding that defendant was a persistent

offender. The question of punishment was not submitted to the jury. Accordingly, we remanded for the sole and limited purpose of resentencing based upon evidence of prior convictions. State v. Holt, 660 S.W.2d 735, 739 (Mo.App. 1983). The question of double jeopardy was not involved because those provisions of the Fifth Amendment have been held not to apply to sentencing. State v. Lee, 660 S.W.2d 394, 399 (Mo.App. 1983).

In this appeal defendant claims the resentencing date after remand became the date of final judgment and Rule 30.01(a) authorizes a new appeal on the same contentions we considered in Bohlen I and an additional ground. Defendant now claims plain error occurred during voir dire when the state made an indirect reference to testimony, or the lack thereof, by defendant in derogation of his rights against self-incrimination protected by federal and

state constitution, statute and rule.[1] There was no objection before the trial court and this issue was not raised in the original appeal.

If we were to reach this new issue we would reject it. The question was improper but does not necessarily draw the attention of the prospective jurors to the defendant, his testimony or its absence. State v. Arnold, 628 S.W.2d 665, 669 (Mo. 1982). Within the standard of plain error concerning fundamental fairness, the question did not necessarily highlight or direct the attention of the venire panel to the fact that defendant may not or did

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[1]The question which defendant contends was offensive was:

> MR. BARRY: Do you understand that you, as jurors, cannot force any witness to testify? Is that clear to all of you? Nor can I, nor can his Honor Judge Saitz. Do you all understand that? We take what's given. We all take what's given. You can't force, I can't force anyone to testify. Is that clear to all of you?

not testify. The reference in the question to "any witness" did not necessarily refer to the defendant.

We do not reach this issue because all that remained in the case after remand in Bohlen I was the matter of resentencing if there was evidence from which the court could find defendant was a persistent offender.[2] Defendant cites no authority supporting his claim to a "reappeal" on matters already decided in the first appeal after a limited remand. We have found none. We apply the rule decided in civil cases that all points presented and decided in an appellate decision remain the law of the case in subsequent proceedings both in trial and appellate courts. Brooks v. Kunz, 637 S.W.2d 135, 138 (Mo.App. 1982). To do otherwise would have the effect of granting successive direct appeals in a

[2]If the state had not prove the alleged prior convictions, then a mistrial would have been in order because the jury did not determine punishment.

criminal case and that procedure has not been authorized by § 547.070 RSMo 1978.

The right to appeal in a criminal case is purely statutory. State ex rel. Garnholz v. LaDriere, 299 S.W.2d 512, 515 (Mo. banc 1957). It follows that any issue not presented in the first appeal and not related to the resentencing may not be considered in an attempted second appeal providing the first appeal followed a final judgment at the time of the appeal. The decision in Bohlen I followed a judgment and sentencing in a criminal case and was a final judgment for purposes of appeal. Accordingly, any issues not raised on direct appeal were waived; the issues presented were decided and are binding upon defendant.

This appeal does not involve any contention of error in regard to evidence supporting a finding that defendant was a persistent offender or the imposition of sentence.

We affirm the sentencing as authorized by law.

--KENT E. KAROHL--

KENT E. KAROHL, Judge

--Robert E. Crist-- --Concurs--

ROBERT E. CRIST,
Presiding Judge

--James A. Pudlowski-- --Concurs--

JAMES A. PUDLOWSKI,
Judge

IN THE
MISSOURI COURT OF APPEALS
EASTERN DISTRICT

DIVISION THREE

STATE OF MISSOURI,	)	
	)	No. 46436
Plaintiff-Respondent,	)	Appeal from the Circuit Court of St. Louis County
vs.	)	
	)	Hon. Milton Saitz
CHRISTOPHER XAVIER BOHLEN,	)	Judge
	)	OPINION FILED:
Defendant-Appellant.	)	April 17, 1984

Defendant-appellant was found guilty by a jury of three counts, each charging robbery in the first degree, § 569.020, RSMo 1978. He was sentenced by the court as a persistent offender, § 558.016.2, RSMo 1978, to serve consecutive fifteen-year sentences on each count.

The state charged that the defendant, acting with others, on April 17, 1981, entered a jewelry store in St. Louis County, Missouri, and took curren-

cy and jewelry from the store, Count I, a wristwatch from the manager of the store, Count II, and a wristwatch from the female employee, Count III. The manager of the store, a female employee and two customers were forced at gunpoint to a back room and ordered to lie on the floor. Witnesses saw four black males and two black females run from the store.

Identification was the central issue. Two witnesses were able to identify the defendant as being one of the robbers. There was evidence connecting the defendant with a cigarette lighter of the type of some lighters taken in the robbery. The defendant called three witnesses all of whom were in the vicinity of the robbery at the time of the occurrence and all of whom were unable to identify him as one of the robbers.

Appellant challenges the convictions on three grounds. First, he contends that the court erred in

failing to dismiss Count III at the close of the state's case because the state failed to call the female employee whose wristwatch was taken in the robbery. Defendant maintains that he was thereby denied his constitutional right to confrontation and cross-examination guaranteed under the Sixth Amendment of the Federal Constitution and applicable in this state under the Fourteenth Amendment. Second, defendant contends that the Court lacked jurisdiction to complete the trial because the judge granted a motion for mistrial during the state's closing argument. In the alternative, defendant contends that the requested mistrial was required by timely objection to the prosecutor's prejudicial closing argument. Third, the defendant contends the punishment should have been imposed by a jury as the state failed to prove that he was a persistent offender.

Appellant's first point is without merit. The

Sixth Amendment guarantees a defendant in a criminal case the right "to be confronted with the witnesses against him" but it does not require the state to produce each and every witness who might present relevant testimony at trial. United States v. Polisi, 416 F.2d 573, 579 (2nd Cir. 1969). See State v. Smith, 632 S.W.2d 3, 5 (Mo.App. 1982). The constitutional guarantee of the Sixth Amendment is one of exclusion rather than mandatory inclusion. Invocation of the Sixth Amendment requires that evidence offered be excluded absent an opportunity by the defendant to test its credibility and probability by cross-examination. Ohio v. Roberts, 448 U.S. 56, 64 (1980). In this case, no such evidence was offered. The store manager testified that when threatened at gunpoint, he gave his wristwatch to one of the robbers and he helped remove the female employee's wristwatch and handed it to the same person. By this testimony alone the state made a

submissible case on Count III. It was not necessary to have the testimony of the owner of the wrist watch. Defendant's right to confrontation was not violated by her absence at trial. Turnbough v. Wyrick, 420 F.Supp. 588 (E.D.Mo. 1976) aff'd 551 F.2d 202 (8th Cir., 1977).

An understanding of the defendant's contention of error directed to his request for a mistrial requires additional facts. The store manager testified that a surveillance system camera was operating during the robbery and that after the robbery he gave the film to a police officer. The manager later viewed the film at a police station but the film was not offered in evidence.

In the opening portion of the state's closing argument the state argued "I believe the state has given you all the evidence you need to convict in this case." The defendant responded by arguing, "perhaps the most significant item in this whole case

is something that you haven't seen, something that I haven't seen, something that none of us will ever see ... Cameras are not like the human mind; they record exactly what they see." Thereafter, in the final portion of the state's closing argument the prosecutor told the jury, "The law obligates me, absolutely obligates me, to provide the defense with any information I have that will either condemn or exculpate the defendant." Defendant's objection that the state was arguing law and not evidence was properly sustained. State v. Holzwarth, 520 S.W.2d 17, 22 (Mo. banc 1975). Immediately thereafter, the prosecutor told the jury, "I assure you if I had a film that showed him, I'd show it to you. He knows that there was a film taken. He also knows that it didn't show a darn thing." The court sustained a general objection to that statement and the prosecutor thereafter immediately said, "There is no film."

Outside of the hearing of the jury the

defendant requested a mistrial and the court said, "I'll grant it." In an effort to save the proceeding the prosecutor explained that he thought that the court's rulings referred only to not arguing the law, offered an apology, and urged the court not to grant the mistrial. The prosecutor then suggested that "the jury be instructed to disregard what I have just argued, that you personally reprimand me for arguing before the jury. ... Reprimand me and instruct the jury that they must disregard what I have just said." Defense counsel suggested that if the judge was inclined to rule in favor of the prosecutor then "I would only re quest the court to make a statement that there was a film, to counteract the statement of counsel." Following a discussion off the record the court overruled the defendant's request for a mistrial. The court then announced to the jury, "Ladies and gentlemen of the jury, the court warns you to disregard the last statement of counsel." The court

neither reprimanded the prosecutor nor did he make a statement about the existence of the film.[1]

Appellant here contends that when the court sustained the motion for a mistrial jurisdiction to proceed was lost. This contention is simply not supported by the record. What occurred out of the hearing of the jury was an announcement by the court that he intended to grant a mistrial. After further argument he reversed his position. The initial statement was noth ing more than an indication of intention at a time when the declaration of a mistrial was within the discretion of the court. State v. O'Neal, 618 S.W.2d 31, 35 (Mo. 1981). The jury never heard the motion for a mistrial or the ruling. No announcement was made to the jury nor did the court announce a declaration of mistrial. In addition,

[1]There being no evidence that the film did not exist the court committed no error in not stating as a fact that it did not exist.

the defendant recognized the possibility that the proceeding would continue and requested alternative relief in the event a mistrial was not declared. The court granted the alternative request in so far as possible. No prejudice resulted. State v. Harry, 623 S.W.2d 577, 579 (Mo.App. 1981).

In the second part of his argument for a mistrial the defendant contends that a mistrial was required because of the prejudicial effect of the prosecutor's statements concerning the film and his obligation to present the film to the defendant. There was no evidence to support the prosecutor's statement that the film did not exist. The evidence indicated that the film was delivered to a police officer and later viewed by the store manager. Absent evidence which described the history of the film from the time it was seen by the manager until the date of the trial is not proper for the prosecutor to argue either the duty of the state to produce it or

what it may have disclosed. See State v. Moore, 428 S.W.2d 563, 565 (Mo. 1968).

The state's failure to justify non-production of the film once its' existence was established entitled the defendant to an inference that the contents of the film were unfavorable to the state's case. State v. Collins, 350 Mo. 291, 165 S.W.2d 647, 649 (1942). Defense counsel properly made that argument in his closing statement. The prosecutor's attempt to deny the defendant the benefit of the inference by asserting the film did not exist and that it did not show a darn thing was improper. Argument not supported in evidence or a misstatement of the evidence is generally regarded as error, especially if the statement of facts not in evidence is willful. State v. Swing, 391 S.W.2d 262, 265 (Mo. 1965). This type of conduct is particularly prejudicial where the prosecutor argued a matter immediately after the court sustained an objection in that regard. State v.

Ralls, 583 S.W.2d 289, 292 (Mo.App. 1979). In the case at bar the prosecutor continued to discuss the film after an objection and after an earlier statement by the judge, during the state's case, to bring in the film. In this case we find that any error was not prejudicial because the jury admonition to disregard the prosecutor's comment was adequate to cure the prejudicial effect. State v. Wren, 643 S.W.2d 800, 802 (Mo. 1983).

Defendant's third point of error concerns sentencing. Our search of the record indicates that although the defendant was sentenced by the judge as a persistent offender no proof was made of the prior convictions. We requested the parties to supplement the record to prove that the prior convictions were presented to the court. No such proof was furnished. We remand for a hearing on the allegations of the prior convictions. If the prior convictions are proved defendant should be resen-

tenced. State v. Holt, 660 S.W.2d 735, 739 (Mo.App. 1983). If the prior convictions are not proved the trial court judgment is reversed and defendant shall receive a new trial in order that a jury may consider all the issues.

Defendant's conviction is affirmed but the sentence is reversed and remanded for resentencing based upon the evidence of prior convictions.

--Kent E. Karohl--
KENT E. KAROHL,
Presiding Judge

JAMES R. REINHARD, Judge Concurs

WILLIAM H. CRANDALL, JR., Judge Concurs

IN THE CIRCUIT COURT
OF THE CITY OF ST. LOUIS
STATE OF MISSOURI

Division #18 Hon. Thos. F. McGuire, Presiding
June 20, 1974

74-377
STATE OF MISSOURI)
)ON
)INFORMATION
v/s)FOR ILLEGAL
)POSSESSION
1974)OF SCHEDULE I
CHRISTOPHER BOHLEN)CONTROLLED
)SUBSTANCE
)HEROIN

Now, on this day, comes the Assistant Circuit Attorney for the State, and the defendant herein, in his own proper person, and in the presence of Daniel Reardon, Attorney and Counsel, in open Court; whereupon the Court orders the Official Court Reporter to take notes to preserve the evidence.

Whereupon, defendant is informed by the Court that he has heretofore entered a plea of guilty on April 29, 1974, to the crime of Illegal Possession

of Schedule I Controlled Substance Heroin and said plea having been accept ed by the Court upon the recommendation of the Assistant Circuit Attorney for the State and being now asked by the Court if he has any legal cause to show why judgment should not be pronounced against him according to law, and still failing to show such cause, it is therefor sentenced, ordered and adjudged by the Court that the said defendant, Christopher Bohlen, having pleaded guilty as aforesaid under Information against him be committed to the Department of Corrections of the State of Missouri, for the period of Two (2) Years, and that the judgment and sentence of this Court herein be complied with or until the said defendant shall be otherwise discharged by due course of law.

It is further ordered by the Court that jail time prior to conviction be allowed defendant in the above entitled cause.

Whereupon, the Court, having duly considered defendant's application for probation heretofore filed herein and being fully advised thereof and upon the recommendation of the Probation Officer, doth deny same.

It is further considered, ordered and adjudged by the Court that the State have and recover of said defendant the costs in this cause expended, and that hereof execution issue therefor.

THE PEOPLE OF THE STATE OF ILLINOIS,	) Indictments) 75-869 - Unlawful) delivery of Con-) trolled Substance.
VS.	) 76-459 - Violation) of controlled Sub-
CHRISTOPHER BOLEN, Defendant.	) stances Act) 76-460 - Violation) of Controlled Sub-) stances Act.

CHANGE OF PLEA TO GUILTY OF ALL THREE INDICTMENTS, PRE-SENTENCE INVESTIGATION

Now on this 6th day of March, 1978, come the People of the State of Illinois by Mr. Steve Rice, Assist. State's Attorney; comes also the defendant, Christopher Bolen, in person, in open court, and with his attorney, Mr. George Ripplinger, attorney at law;

And now the defendant comes and by and through his attorney informs the Court that he wishes to withdraw his prior pleas of not guilty to the charges as contained in the above indictments, and to now enter pleas of guilty to each of said indictments.

Whereupon, the Court advises the defendant of his constitutional rights, including his right to trial by jury, or by the Court without a jury, to confront witnesses who may testify against, as well as the possible consequences of his pleas of guilty under the old law and under the new law as of Feb. 1, 1978, and the defendant still persisting in his pleas of guilty to each indictment, the Court having heard and considered the factual basis of the states cases as to each indictment, accepts the defendant's pleas of

guilty to each indictment, and finds and adjudges the said defendant, Christopher Bolen, guilty of the crime of Unlawful Delivery of Controlled substance, as alleged in Indictment No. 75-869, and guilty of Violation of Controlled Substances Act, as alleged in Indictment 76-459, and guilty of Violation of Controlled Substances Act as alleged in Indictment 76-460, and the defendant's age to be 26 years.

The Court at this time orders a pre-sentence investigation and report to this Court on April 14, 1978, at nine a.m., in courtroom No. 9. The defendant is remanded to the custody of the Sheriff of St. Clair County pending further order of this Court.

--Patrick J. Fleming--

PATRICK J. FLEMING, Judge

W.J. Montgomery
Reporter

CC: Probation Department
Negot. Plea; in exchange for plea of guilty to each of the three indictments the State agrees to recommend the sentence of three years on each of three indictments, each to run concurrently, under new act.

IN THE CIRCUIT COURT
TWENTIETH JUDICIAL CIRCUIT OF ILLINOIS
ST. CLAIR COUNTY

THE PEOPLE OF THE STATE OF ILLINOIS,	))75-CF-869)No.76-CF-459)76-CF-460
VS.	))
CHRISTOPHER BOHLEN,	)Charge of Vio.
	)of Cent. Subs.
Defendant.	)Act

PRE-SENTENCE HEARING

Come the People of the State of Illinois by Mr. Rick Sturgeon, Assistant State's Attorney; comes also the defendant, in person, in open court, and with his attorney, Mr. George Ripplinger.

It appearing to the Court that on the 6th day of March, 1978, this defendant entered his pleas of guilty to the charges contained in three indictments, that pre-sentence investigation and report was ordered, and copies of same have been received by all parties, and that the case is now before the Court for disposition.

The Court now advises the defendant of his right to exercise an option to be sentenced under the old law or the new law, and the defendant elects with approval of his attorney to be sentenced under the new law.

ORDER AND JUDGMENT ON SENTENCE

The Court finds the age of said defendant to be 26 years.

The Court having considered evidence and statements in mitigation and aggravation of the offense, and now the defendant saying nothing further why the sentence of the Court should not be pronounced against him, the particular evidence, information, factors or other reasons why the Court is going to impose probation in this case are as follows:

After due consideration and deliberation the Court finds in AGGRAVATION the following: (1) The defendant has a history of prior delinquency or criminal activity; (2) The sentence is necessary to deter others from committing the same crime.

In addition the Court finds in MITIGATION the following: (1) The defendant's conduct neither caused nor threatened the serious physical harm; (2) Defendant did not contemplate that his criminal conduct would cause serious physical harm.

Whereupon, no reason appearing as to why sentence should not be pronounced, the Court sentences the defendant as follows: The defendant is remanded to the custody of the Department of Corrections for a term of three years. Judgment entered on the sentence. Court costs and State's Attorney's fees are hereby assessed against the defendant. Mittimus to issue. Defendant to be given credit for time served in the St. Clair County Jail relative to this offense.

Defendant is advised of his right to appeal.

--Patrick J. Fleming--

PATRICK J. FLEMING, Judge

4/14/78 S.Roe

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 91-3360EMSL

Christopher X. Bohlen, Plaintiff-Appellant,	•	Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc
vs.	•	
Paul D. Caspari, et al., Defendants-Appellees.	•	

The suggestion for rehearing en banc is denied. The petition for rehearing is also denied.

December 8, 1992

Order Entered at the Discretion of
the Court:
--Michael E. Gans--
Clerk, U.S. Court of Appeals,
Eighth Circuit

PETITION UNDER 28 USC § 2254 FOR WRIT
OF HABEAS CORPUS BY A PERSON
IN STATE CUSTODY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

Name: Christopher X. Bohlen
Prisoner No.: 45420
Case No.: 89-1651-C-4
Place of Confinement:
Missouri Eastern Correctional Center
18701 Old Highway 66
Pacific, MO 63069-9799
Name of Petitioner:
Christopher X. Bohlen
Name of Respondent:
Paul Caspari
The Attorney General of the State of:
Missouri - William Webster

PETITION

1. Name and location of court which entered the judgment of conviction under attack:
   Division 17 of the Circuit Court, 22nd Judicial Circuit, St. Louis County, MO; 7900 Carondelet, Clayton, MO 63105.

2. Date of judgment of conviction:
   October 15, 1982

3. Length of sentence:
   Three consecutive 15-year sentences aggregating 45 years.

4. Nature of offense involved (all counts):
Three counts of robbery first degree.

5. What was your plea?(Check one)
(a) Not guilty [X]
(b) Guilty [ ]
(c) Nolo contendere [ ]
If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

---

6. If you pleaded not guilty, what kind of trial did you have? (Check one)
(a) Jury [X]
(b) Judge only [ ]

7. Did you testify at trial?
Yes [ ] No [X]

8. Did you appeal from the judgment of conviction?
Yes [X] No [ ]

9. If you did appeal, answer the following:
(a) Name of court: Missouri Court of Appeals, Eastern District.
(b) Result: Conviction Affirmed.
(c) Date of result and citation, if known: April 17, 1984
(d) Grounds raised: (See attached).

The trial court erred, to the prejudice of Appellant, in going forward with the trial after declaring a mistrial in response to defense motion for the reason that the trial court was without jurisdiction to proceed with the same jury, and for the reason that the declaration of

mistrial was required by the improper and prejudicial conduct of the prosecuting attorney in closing argument in referring to matters outside the record in defiance of court rulings.

The trial court erred to the prejudice of Appellant in refusing to dismiss Count III of the information which charged a stealing from Minerva Paster, for the reason that Minerva Paster did not testify in the case, and there was no showing of unavailability, so that Appellant was deprived of his right to confront and cross examine the witnesses against him guaranteed by the Sixth Amendment of the United States Constitution, and was thus denied due process of law guaranteed by the Fourteenth Amendment.

(e) If you sought further review of the decision on appeal by a higher state court, please answer the following:
(1) Name of court: Missouri Supreme Court.
(2) Result: Application of Transfer denied.
(3) Date of result and citation, if known: June 19, 1984.
(4) Grounds raised: (See attached).

The trial court erred, to the prejudice of Appellant, in going forward with the trial after declaring a mistrial in response to defense motion for the reason that the trial court was without jurisdiction to proceed with the same jury, and for the reason that the declaration of mistrial was required by the improper and prejudicial conduct of the prosecuting attorney in closing argument in referring to matters outside the record in defiance of court rulings.

The trial court erred to the prejudice of Appellant in refusing to dismiss Count III of

the information which charged a stealing from Minerva Paster, for the reason that Minerva Paster did not testify in the case, and there was no showing of unavailability, so that Appellant was deprived of his right to confront and cross examine the witnesses against him guaranteed by the Sixth Amendment of the United States Constitution, and was thus denied due process of law guaranteed by the Fourteenth Amendment.

(f) If you filed a petition for certiorari in the United States Supreme Court, please answer the following with respect to each direct appeal:

(1) Name of court: n/a
(2) Result: n/a
(3) Date of result and citation, if known: n/a
(4) Grounds raised: n/a

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?
Yes [X] No [ ]

11. If your answer to 10 was "yes", give the following information:

(a) (1) Name of court: Division 17, 22nd Judicial Circuit;
(2) Nature of proceeding: Motion filed pursuant to Missouri Supreme Court Rule 27.26 (repealed);
(3) Grounds raised: See attached sheet.

A. Petitioner was denied due process of law and effective assistance of counsel when agents of the State negligently and/or intentionally lost or destroyed material evidence that could have established his innocence or negated his guilt;
B. The Defendant was subjected to double jeopardy in violation of the Fifth Amendment to the United States Constitution when the court allowed the State to present evidence at two separate enhancement proceedings when it was determined that the evidence presented at the original enhancement proceeding was deficient. The result being that the Defendant's sentence was enhanced and the sentence of 45 years was imposed;
C. The assessment of a $26.00 judgment against Movant violated the Ex Post Facto clause to the State and Federal Constitution.

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes [X] No [ ]
(5) Result: Motion was denied.
(6) Date of result: September 15, 1986.

(b) As to any second petition, application or motion give the same information:
(1) Name of court: n/a
(2) Nature of proceeding: n/a

(3) Grounds raised: n/a
(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes [ ] No [ ] n/a
(5) Result: n/a
(6) Date of result: n/a

(c) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?

(1) First petition, etc.:
Yes [X] No [ ]

(2) Second petition, etc."
Yes [ ] No [X]

(d) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

12. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same.

CAUTION: In order to proceed in federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, you should raise in this petition all available grounds (relating to this conviction)

on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grant or petit jury which was unconstitutionally selected and impaneled.

(i) Denial of effective assistance of counsel.

(j) Denial of right of appeal.

A. Ground one: See separate sheet.

A. Defendant's conviction was obtained by a violation of his privilege against self incrimination in that the prosecuting attorney was allowed during voir dire examination to inform the jury that neither they nor he nor the court could force any witness to testify. The prosecutor thus intentionally directly commented on Defendant's right to refrain from testifying and violated Petitioner's privilege against self incrimination as guaranteed by the Fifth and Fourteenth Amendment to the United States Constitution.

Supporting FACTS (state briefly without citing cases or law):

Supporting Facts: Voir Dire transcript, Page 22 - Mr. Barry (Assistant Prosecuting Attorney): "Do you all understand that you, as jurors, cannot force anyone to testify. Nor can I, nor can his honor, Judge Sitz. Do you understand that? We take what is given. We all take what is given. You can't force, I can't force anyone to testify. Is that clear to all of you?" (See Exhibit 1).

B. Ground two: Separate sheet.

B. Defendant was deprived of due process of law when the trial court, after declaring a mistrial, proceeded without jurisdiction with the same jury and, as a direct result of the improper and prejudicial conduct of the prosecuting attorney in closing argument, a conviction was obtained. The argument of the prosecuting attorney referred to matters outside the record and was in defiance of earlier

court rulings and violated movant's right to a fair trial as guaranteed him by the Fifth and Fourteenth Amendments to the United States Constitution.

Supporting FACTS (state briefly without citing cases or law):

Supporting Facts: Transcript, 326-328.
Mr. Barry: "If I had a film that showed him, I would show it to you. He knows that there was film taken. He also knows that it didn't show a darn thing."

Mr. Leads: "Judge, I am going to object. I ask that statement be stricken."

The Court: "I will sustain the objection. The last statement --"

Mr. Barry: "Counsel argue this. I believe I am --"

The Court: "Just a minute, Mr. Barry. I ruled on the objection. Let's continue."

Mr. Barry: "There is no film."

Mr. Leads: "Judge, I am going to object."

The Court: "Step to side board, please, you too, Mr. Barry."

<u>PROCEEDINGS OUTSIDE HEARING OF THE JURY</u>

The Court: "I cautioned you --"

Mr. Barry: "Yes, your honor."

The Court: "Do you have any other requests at this time?"

Mr. Leads: "I would, for the record, I would request a mistrial."

The Court: "I'll grant it."

• • •

(OFF THE RECORD DISCUSSION)

The Court: Back on the record. The Court, after consideration, overrules the Defendant's request for a mistrial and the jury will be instructed to disregard the last statement of counsel. (See Exhibit 2).

C. Ground three: See separate sheets.

The Defendant was denied due process of law when the trial court failed to declare a mistrial when the prosecuting attorney improperly and prejudicially argued facts and matters not before the jury in evidence which he knew to be improper. The prosecuting attorney argued that there was no film and that if the film had showed him innocent he would have brought it to show to the jury when in fact he had earlier declared to the court that the film had been destroyed. This deceptive and improper argument violated movant's right to a fair trial as guaranteed him by the Fifth and Fourteenth Amendments to

the United States Constitution.

Supporting FACTS (state briefly without citing cases or law): See separate sheet.

Supporting Facts: See Point 2 (transcript p. 134-136) (See Exhibit 3).

D. Ground four. See separate sheet.

Defendant was denied his right to confront and cross examine witnesses against him as guaranteed by the Sixth Amendment to the United States Constitution and due process of law as guaranteed him by the Fourteenth Amendment to the United States Constitution when the court refused to dismiss Count III of the information - stealing from Minerva Paster - for the reason that the victim did not testify in the case and there was no showing of unavailability.

Supporting FACTS (state briefly without citing cases or law):

Supporting Facts: Trial transcript p. 285-287. (See Exhibit 4).

E. Petitioner was denied due process of law and a fair trial in violation of the Sixth and Fourteenth Amendments to the United States Constitution because agents of the State destroyed material evidence thus depriving Defendant of the use of the material which could have established his innocence or negated his guilt.

Supporting Facts:

The robbery was filmed by a camera located on the premises. According to the prosecuting attorney, the film was destroyed. (Tr. 136) It is Petitioner's contention that the film would have demonstrated that he was not in the store on the date in question and did not participate in the robbery as alleged in the information. The impact resulting from the destruction of this evidence is aggravated by the prosecutor's insistence, without factual foundation, that the film was insignificant. See Point 12 (B) and (C), supra. (See Exhibit 5)

F. Petitioner was subjected to double jeopardy in violation of the Fifth Amendment to the United States Constitution when the state was allowed to adduce additional evidence at a second enhancement proceeding to meet its burden of proof under the terms of the Missouri persistent defender statute (558.016 RSMo. 1982).

Supporting Facts:

The State failed to offer any proof to establish his prior of convictions necessary to enhance his sentence at either his original sentencing proceeding, or when requested by the Court of Appeals, State v. Bohlen, 670 S.W. 2d 119, 123 (1984). The cause was remanded to the trial court and the State was improperly allowed a second bite of the apple and apparently mustered sufficient evidence to satisfy Missouri's statutory sentencing requirement. § 558.016.2, RSMo 1978.

G. Petitioner was denied effective assistance of counsel when trial counsel failed to pursue the Motion for a Mistrial during the closing argument of the State when the court indicated that it would grant said motion. Nor did defense counsel request the court to admonish the prosecuting attorney in the presence of the jury although the court indicated at one point in time their willingness to do so. The argument in question was highly prejudicial and counsel's failure to persist in his request for mistrial that had already been granted was without strategical purpose.

Supporting Facts:

See Point 1.

H. Defendant was denied effective assistance of counsel guaranteed by the Sixth Amendment to the United States Constitution in that his trial attorney was incompetent for failing to assert the defense of alibi and for failing to interview alibi witnesses Ricky Martin, Cornell Whitfield and Lisel Spivey.

Supporting Facts:

According to the Appellate Court in Bohlen v. State, 743 S.W.2d 425 (Mo. App. 1987), Movant testified in his 27.26 hearing that he gave his trial counsel the names of two alibi witnesses, Ricky Martin and Cornell Whitfield. Id., at 427. Martin and Whitfield testified in the 27.26 hearing. Id. According to the

Appellate Court, Martin testified that Movant was at the Maison De Bleu Hari Salon from around 11:00 a.m. until 2:00 or 3:00 p.m. on April 17, 1981. Id. Whitfield testified that he arrived at the Salon around 12:30 and Movant was already there and remained until 2:00 or 3:00 p.m. Id. Movant's trial attorney testified, according to the Appellate Court, that Movant advised him of several possible alibis, among them his employer, girlfriend, an unidentified female, and the hair styling salon. Id. According to trial counsel, he investigated the employer, the girlfriend, and the woman. Id. Counsel stated that he phoned the hair salon and spoke to someone there. Id. Counsel did not know who he spoke to but did know that he did not talk to Martin or Whitfield, since he had spoken to a woman. Id.

Lisel Spivey was subpoenaed by counsel and brought to court but was not called to testify. Id., at 428. Spivey, who pleaded guilty to the jewelry store robbery, would have testified that Movant did not participate in the robbery.

I. The prosecuting attorney violated Defendant's right to due process and equal protection of the law guaranteed by the Fourteenth Amendment to the United States Constitution, when the prosecutor used seven of his preemptory strikes to strike all the black members from the jury panel.

Supporting Facts:

Movant asserts that the prosecutor used

seven preemptory strikes to remove all black members of the jury panel in order to obtain an all white jury. Movant is black, and therefore, the prosecutor's actions deprived him of a fundamentally fair trial before a jury of his peers.

J. Defendant was denied due process of law and effective assistance of counsel guaranteed by the Fifth, Sixth and Fourteenth Amend ments to the United States Constitution when trial counsel failed to object to the admission of evidence which was not shown to have any connection to the defendant, but which may have been found to be related to the crime, where the jury could have mistakenly inferred a relationship between the defendant and the evidence, thus creating an improper basis for a finding of guilt.

Supporting Facts:

State's Exhibits 4, 5, and 6, a cap, a ski-mask, and a trash bag, were introduced by the State and repeatedly exhibited to the jury during the questioning of the State's witnesses without objection or request for qualification by defense counsel. [Transcript 31, 79-80, 82, 92-94, 106, 117, 118, 120, 141, 147, 158, 179]. These items seized from the home of Major Bogan who was never alleged or shown to have any connection with the defendant. [Transcript 92-93]. The State implied a connection between the Exhibits and the robbers and a connection between the defendant and the Exhibits. Because trial counsel failed to object to the admission or

request qualification about the use of the Exhibits as evidence against the defendant, the jury was erroneously allowed to connect the defendant to the Exhibits and thus to the robbery. (See Exhibit 6).

K. Defendant was denied due process of law, effective assistance of counsel, and his right to be free from compelled self-incrimination as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution when trial counsel allowed the defendant to be compelled to place a cap, State's Exhibit 4, on his head in front of the jury while the prosecuting attorney questioned a witness about the perpetrator of the crime who was alleged to have worn a similar cap. [Transcript 179-80]. This demonstration by the prosecuting attorney unnecessarily forced the defendant to create the impression for the witness and the jury that the defendant not only resembled, but was, the perpetrator.

Supporting Facts:

During the testimony of State's witness Mark Lang, [Transcript 174-181] the prosecuting attorney requested defense counsel to instruct the defendant to place a cap State's Exhibit 4 on his head for observation by the witness and the jury. After initially stating an objection, trial counsel, without waiting for a ruling from the judge, withdrew his objection and ordered the defendant to comply. [Transcript 179]. The prosecutor ordered the defendant to press the hat down on his head

so that defendant's hair would stick out from the bottom of the cap in a manner consistent with the testimony of witnesses to the crime in order to create the look which the prosecutor sought to convey to the witness and the jury. [Transcript 179-80]. The prosecutor then asked, "Is that the shape of the hat you saw on this man's head that day?" [Transcript 180]. "The shape of the hat" could have been established without allowing the defendant to be forced to display his hatted self to the witness and the jury. (See Exhibit 6, p. 179-80).

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state briefly what grounds were not so presented, and give your reasons for not presenting them:

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?

Yes [ ] No [X]

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing:
Kenneth Leeds

(b) At arraignment and plea:
Kenneth Leeds

(c) At trial:
Kenneth Leeds

(d) At sentencing:
Kenneth Leeds, Frank Anzalone, 111 S. Bemiston, Suite 211, Clayton, MO

63105.

(e) On appeal:
Toby Hollander

(f) In any post-conviction proceeding:
Toby Hollander

(g) On appeal from any adverse ruling in a post-conviction proceeding:
n/a

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?

Yes [X] No [ ]

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes [ ] No [X]

(a) If so, give name and location of court which imposed sentence to be served in the future:

(b) Give date and length of the above sentence:

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes [ ] No [ ]

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

-RICHARD H. SINDEL-
Richard H. Sindel
8008 Carondelet, Suite 301
Clayton, MO 63105
(314) 721-6040

I declare under penalty of perjury that the foregoing is true and correct. Executed on August 8, 1989.

(date)

--CHRISTOPHER X. BOHLEN--
Signature of Petitioner

No. 92-1500

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1992

PAUL CASPARI AND JEREMIAH W. (JAY) NIXON,

Petitioners,

v.

CHRISTOPHER BOHLEN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION

RICHARD H. SINDEL
Counsel of Record

Sindel & Sindel, P.C.
8008 Carondelet, Suite 301
St. Louis, Missouri 63105
(314) 721-6040

Attorney for Respondent

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TABLE OF AUTHORITIES

CASES

OPINIONS BELOW

The Eighth Circuit's opinion included in Petitioners' Appendix at A-3 is inaccurate because its conclusion at page A-23 was not the Court's final conclusion. The conclusion was amended, as indicated by the court order set forth on pages A-1 and A-2 of Petitioners' Appendix.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Section 558.016, RSMo 1984 provides:

Extended terms for persistent or dangerous offenders - definitions. -

1. The court may sentence a person who has pleaded guilty to or has been found guilty of a class B, C, or D felony to a term of imprisonment as authorized by section 558.011, if it finds the defendant is a prior offender, or to an extended term of imprisonment if it finds the defendant is a persistent offender or a dangerous offender.

2. A "prior offender" is one who has pleaded guilty to or has been found guilty of one felony.

3. A "persistent offender" is one who has pleaded guilty to or has been found guilty of two or more felonies committed at different times.

4. A "dangerous offender" is one who:

(1) Is being sentenced for a felony during the commission of which he knowingly murdered or endangered or threatened the life of another person or knowingly inflicted or attempted or threatened to inflict serious physical injury on another person; and

(2) Has pleaded guilty to or has been found guilty of a class A or B felony or a dangerous felony.

5. The pleas or findings of guilty shall be prior to the date of commission of the present offense.

6. The total authorized maximum terms of imprisonment for a persistent offender or a dangerous offender are:

(1) For a class A felony, any sentence authorized for a class A felony:

(2) For a class B felony, a term of years not to exceed thirty years;

(3) For a class C felony, a term of years not to exceed fifteen years;

(4) For a class D felony, a term of years not to exceed ten years.

Section 558.021, RSMo 1984 provides:

Extended term procedures -

1. The court shall find the defendant to be a prior offender, persistent offender, or dangerous offender, if

(1) The indictment or information, original or amended, or the information in lieu of an indictment pleads all essential facts warranting a finding that the defendant is a prior offender, persistent offender, or dangerous offender; and

(2) Evidence is introduced that establishes sufficient facts pleaded to warrant a finding beyond a reasonable doubt that the defendant is a prior offender, persistent offender, or dangerous offender; and

(3) The court makes findings of fact that warrant a finding beyond a reasonable doubt by the court that the defendant is a prior offender, persistent offender, or dangerous offender.

2. In a jury trial, the facts shall be pleaded, established and found prior to submission to the jury outside of their hearing, except the facts required by subdivision (1) of subsection 4 of section 558.016 may be established and found at a later time, but prior to sentencing, and may be established by judicial notice of prior testimony before the jury.

3. In a trial without a jury or upon a plea of guilty, the court may defer the proof and findings of such facts to a later time, but prior to sentencing. The facts required by subdivision (1) of subsection 4 of section 558.016 may be established by judicial notice of prior testimony or the plea of guilty.

4. The defendant shall be accorded full rights of confrontation and cross-examination, with the opportunity to present evidence, at such hearings.

5. The defendant may waive proof of the facts alleged.

6. Nothing in this section shall prevent the use of presentence investigations or commitments under sections 557.026 and 557.031, RSMo.

7. At the sentencing hearing both the state and the defendant shall be permitted to present additional

information bearing on the issue of sentence.

STATEMENT OF CASE

Contrary to Petitioners' contention on page 14 of their Petition, the Eighth Circuit did not order Respondent Christopher Bohlen to be released from custody unless the state resentenced him without invoking the persistent offender statute. The Eighth Circuit originally issued such an order. Petitioners' Appendix at A-23. The Eighth Circuit, however, granted Respondent Christopher Bohlen's Motion to Amend the Judgment and deleted the language "directing the Missouri circuit court to resentence Bohlen without application of the persistent offenders statute" and instead ordered the Missouri circuit court to issue "a conditional writ of habeas corpus consistent with this opinion." Id., at A-1.

SUMMARY OF ARGUMENT

This Court should not review the decision of the Eighth Circuit because there is no basis for a review of the decision in that there is no conflict in the circuits on any issue presented, there is not an important question of federal law involved in the case, and there has been no departure from the accepted and usual course of judicial proceedings. Sup. Ct. R. Rule 10(a).

The holding of this Court in Bullington v. Missouri, 451 U.S. 430 (1981) is applicable to Respondent's case because Respondent was placed twice in jeopardy when the State failed to present any evidence at a sentencing hearing, a hearing which contained all of the hallmarks of a criminal trial (A-42, 44), but two years later was permitted to present evidence at a second sentencing hearing. Petitioners' representations that there is a split in the various circuits that have addressed similar claims is erroneous because the decisions in those courts focused on whether a retrial was permissible because of trial court error and not because of a failure of proof. The principle applied by the Eighth Circuit is not barred by Teague v. Lane, 489 U.S. 288 (1989) because the Eighth Circuit based its decision on precedent applicable at the time Respondent's judgment and sentence became final on June 19, 1984.

There is no need to revisit or reverse Bullington, supra. This Court has declined to disturb holdings that double jeopardy applies to non-capital sentencing proceedings. Petitioners and amici have not established a valid basis for revisiting or

reversing Bullington. The arguments advanced by amici and Petitioners were considered by this Court in 1981 and were rejected. Furthermore it would be improper to revisit Bullington because Bohlen's sentence was not and could not have been a death sentence.

ARGUMENT

I.

BULLINGTON IS APPLICABLE TO RESPONDENT'S NON-CAPITAL SENTENCING PROCEEDING.

Bullington v. Missouri, 451 U.S. 430, 446 (1981) held that the double jeopardy clause applies to a sentencing proceeding when the proceeding closely resembles a criminal trial. In Burks v. United States, 437 U.S. 1 (1978), this Court held that double jeopardy precludes a second trial when the original trial was reversed based on the insufficiency of the evidence, as distinguished from a reversal based on trial error. In the present case, the State of Missouri failed to present any evidence[1] at the initial sentencing hearing, a hearing with all of the hallmarks of a criminal trial,[2] (A-13, 22) and thus, was barred by the double jeopardy clause from submitting evidence at a second sentencing hearing. Double jeopardy forbids a second hearing to afford the prosecution an opportunity to supply evidence it failed to present in the first proceeding. United States v. DiFrancesco, 449 U.S. 117, 128 (1980); Burks, supra at 11.

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[1] During the original trial proceeding, the State failed to produce any evidence to prove that Respondent was a persistent offender.

[2] At the hearing to determine persistent offender status, defendants in Missouri have: (1) full rights of confrontation and cross-examination; (2) the opportunity to present evidence; and (3) the burden of proof placed on the State requiring it to produce evidence that proves beyond a reasonable doubt that the defendant is a persistent offender. Sections 558.021.1(2), and 558.021.4, RSMo 1981.

Petitioners contend that the issue they present before this Court was left open in Lockhart v. Nelson, 488 U.S. 33, 37-38 n.6 (1988). In Nelson, the Supreme Court assumed that the double jeopardy clause applied to non-capital sentencing proceedings because the courts below and the State had conceded the principle. Id. This Court found no need to review the issue in Nelson and Petitioners have advanced no acceptable or compelling reason why this Court should review their claim.

Petitioners claim that Bullington is distinguishable from the present case because there was a lack of sentencing discretion in Bullington's case, which is not present in Respondent's case. In Bullington, the trier of fact would determine whether "yes", the death penalty was warranted, or "no", the death penalty was not warranted. In the present case, the trier of fact was required to make just such a "yes/no" decision and thus, lacked broad sentencing discretion, as in Bullington. The judge in the present case had to decide whether Respondent was a persistent offender ("yes") or not a persistent offender ("no"). The present case is identical to the situation in Bullington and analogous to the guilt/innocent decision, because the fact finder must choose between two alternatives, instead of a sentencing decision in which a judge makes a choice among a broad spectrum of possible punishments. Bullington, supra at 440-441: Kadish, "Legal Norm and Discretion in the Police and Sentencing Processes," 75 Harv. L. Rev. 904, 916 (1962) (Where the judge has power to select a term of

imprisonment within a range the exercise of that authority is left fairly at large.")

Petitioners contend that there is a conflict in the circuits citing Hunt v. New York, 112 S. Ct. 432 (1991). Petitioners would have this Court rely on a single dissent from a denial of certiorari. Hunt, supra at 432. The denial of certiorari of a claim that the double jeopardy clause does not apply to non-capital sentencing proceedings is consistent with and supportive of Respondent's position. There is no need to address the issue again in this case. French v. Estelle, 692 F.2d 1021 (5th Cir. 1982), cert. denied, 461 U.S. 937 (1983). Given the opportunity, the Supreme Court has declined to disturb holdings that double jeopardy applies to non-capital sentencing proceedings. See e.g., Durosko v. Lewis, 882 F.2d 357 (9th Cir. 1989), cert. denied, 110 S. Ct. 1930 (1989); Nelson v. Lockhart, 828 F.2d 446 (8th Cir. 1987), reversed on other grounds, 488 U.S. 33 (1988); French, supra; Bullard v. Estelle, 665 F.2d 1347 (5th Cir. 1982), vacated on other grounds, 459 U.S. 1139 (1983). The dissenting opinion in Hunt does not claim that there exists a split in the circuits and does not support the proposition that the double jeopardy clause is inapplicable to non-capital sentencing enhancement proceedings. Hunt, supra at 432.

The alleged split in the circuits is illusory. Upon review of the opinions of the various circuit courts, it becomes clear that the circuit courts focus on whether there was an insufficiency of

the evidence or trial error, finding double jeopardy implications for the former, but not the latter.

Petitioners claim Linam v. Griffin, 685 F.2d 369 (10th Cir. 1982), cert. denied, 459 U.S. 1211 (1983) supports their position that a defendant may be acquitted of a crime, but not of a sentence.[3] Linam, however, is distinguishable from the present case because in Linam the evidence was incorrectly excluded. The prosecution in Linam did not fail to meet its burden of proof, but was thwarted from doing so by trial court error. In the present case, the prosecutor completely failed to carry or advance his burden of proof. "In Burks and again in Bullington the [United States Supreme] Court emphasized that failure of the prosecution to prove facts when it has an unfettered opportunity to do so results in reversible error because of insufficient evidence." Bullard, supra at 1359. A total failure of proof is distinguishable from those situations in which evidence was produced, but excluded erroneously. Tate v. Armontrout, 914 F.2d 1022, 1026 (8th Cir. 1990).

In the present case, the State must be held accountable for its failure to produce evidence of the prior convictions. The State had an "unfettered opportunity" to prove persistent offender status. Bullard, supra at 1359. In the present case, as in the situation in which the State fails to produce evidence in a

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[3] It was not Respondent's claim in the court below that he had been acquitted of a "sentence" but rather that the State had failed to muster the necessary evidence to support classifying him as a persistent offender.

criminal trial to support an element of the offense, that failure precludes the State from a second opportunity to muster its evidence and present the proof. The State is not permitted to return to the trial court again and again to make its case. The State, by its own error and omission, surrendered its single opportunity to present its proof at the first sentencing proceeding. The State was allowed "one bite at the prosecution apple" and should not be permitted a "second". Burks, supra at 17.

Petitioners argue Denton v. Duckworth, 873 F.2d 144, 148 (7th Cir.), cert. denied, 110 S. Ct. 341 (1989) supports their proposition that Bullington is not applicable to sentencing enhancement proceedings. Denton is distinguishable from the present case. In Denton, the State's partial reliance on one invalid conviction did not negate the other conviction evidence that was sufficient to find that the defendant was a habitual offender. In the present case, however, there was a total failure of proof. The evidence was not only insufficient, it was non-existent.

Petitioners claim that the persistent offender hearing is not a trial on the punishment, as was the situation in Bullington. The sentencing proceeding in Respondent's present case closely resembled a criminal trial because Missouri legislature installed as a prerequisite all the traditional hallmarks of a criminal trial. The State is required to prove its case for sentencing enhancement beyond a reasonable doubt. Section 558.021.1(2), RSMo 1984. The defendant at the sentencing enhancement proceeding is

afforded Sixth Amendment rights to full confrontation and cross-examination of the witnesses and is granted the opportunity to present evidence. Section 558.021.4, RSMo 1984. The trier of fact must find that the State has met its burden of proof beyond a reasonable doubt. Section 558.021.1(3), RSMo 1984. The standard of requiring proof beyond a reasonable doubt, the right to confrontation and cross-examination, and the right to present evidence, are all requirements necessary to sustain a conviction at a criminal trial. The persistent offender hearing closely resembled a criminal trial because its procedure required and included all the hallmarks of an adversarial criminal proceeding.

Petitioners claim that Respondent is barred from raising the claim he presented in the lower courts by Teague v. Lane, 489 U.S. 288 (1989). Petitioners have not cited, because they cannot cite, controlling law that Teague would bar Respondent's claim.

The double jeopardy ruling which is applicable is dictated by the 1978 case of Burks v. United States, 437 U.S. 1 (1978) (double jeopardy precludes a second trial when the original trial was reversed based on insufficiency of the evidence, which is distinguishable from a reversal based on trial error) and Bullington, supra (double jeopardy precludes a second sentencing proceeding when the proceeding closely resembles a criminal trial). See Penry v. Lynaugh, 492 U.S. 302, 314-315 (1989) (the holding requiring a jury instruction regarding mental retardation and an abused childhood on the issue of mitigation, was not a "new rule" because it was a rule dictated by two prior cases). Neither

Nelson, supra nor Tate, supra broke new ground or imposed new obligations on the prosecutor. Teague, supra at 301.

The issue is whether double jeopardy principles apply to successive sentencing enhancement proceeding. The Court in Bullington, supra at 446 held that proceedings that have the hallmarks of a criminal trial are subject to the double jeopardy clause. Respondent's sentencing proceeding closely resembled a criminal trial and thus, double jeopardy applied to preclude a successive sentencing proceeding when there had been a complete failure of proof at the original sentencing proceeding. This principle is not based on "new law." Teague does not bar federal review because the result Respondent seeks is dictated by and is a natural consequence of the precedent established by the 1981 decision in Bullington, a case which existed at the time Respondent's conviction became final on June 19, 1984. State v. Bohlen, 670 S.W.2d 119 (Mo. App. 1984).

Furthermore, a "new rule" should be applied retroactively if it requires the observance of those procedures "implicit in the concept of ordered liberty". Id., at 307. The prohibition against double jeopardy is such a procedure. Green v. United States, 355 U.S. 184, 187 (1957) ("The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of

anxiety and insecurity ... ") (emphasis added). Thus, the law should be applied retroactively in the present case even if this Court finds that the double jeopardy claims made by Respondent consist of "new law" under Teague.

Petitioners seek to insulate the Missouri court's decision because it is, in their opinion, a "reasonable good-faith interpretation of existing precedent." Respondent's Brief, at 21. If the single standard for review of a State court interpretation of a federal right was whether the interpretation was "reasonable or in good-faith", the State court would be the sole determiner of federal constitutional claims. Any review by federal courts would be barred by Teague absent an admission that the state court was not acting reasonably or in good faith. Certainly, that was not the intent of Teague.

The Eighth Circuit, recognized that the application of Bullington to the present case was "not a sufficient stretch to cause it to be a new rule under Teague". Petitioners' Appendix, at A-22.

None of Petitioners' claims either involve important questions of federal law or raise a conflict with federal law. Thus, none of the claims warrant the granting of a Writ of Certiorari by this Court.

II.

BULLINGTON NEED NOT AND SHOULD NOT BE REVISITED OR REVERSED.

Petitioners and amici advocate reversal of Bullington because it conflicts with precedent existing prior to Bullington and wrongly expands upon the principles annunciated in North Carolina v. Pearce, 395 U.S. 711 (1969). Bullington is readily distinguishable from Pearce, because in Pearce, "there was no separate sentencing proceeding in which the prosecution was required to prove -- beyond a reasonable doubt or otherwise -- additional facts in order to justify the particular sentence." Bullington, supra at 439. The decision in Pearce does not effect the continued vitality of Bullington, a case decided more than a decade later.

Although Petitioners claim that Bullington has lost its vitality, the Supreme Court has yet to question the continued viability of Bullington's holding. See Arizona v. Rumsey, 467 U.S. 203, 212 (1984) (Respondent "has suggested no reason sufficient to warrant [the Court] taking the exceptional action of overruling Bullington"). Numerous decisions of the United States Supreme Court have recognized Bullington's continued vitality. See e.g., Poland v. Arizona, 476 U.S. 147, 152-154 (1986); Rumsey, supra at 205-212 (Bullington dictates holding that Arizona's capital sentencing proceeding resembled a trial for purposes of the double jeopardy clause and thus, double jeopardy precluded a death sentence after the defendant had initially received a life sentence); and Spaziano v. Florida, 468 U.S. 447, 458 (1984).

The Supreme Court has denied certiorari in non-capital cases involving the application of double jeopardy principles to sentence enhancement proceedings. Hunt, supra at 432; French v. Estelle, 692 F.2d 1021 (5th Cir. 1982), cert. denied, 461 U.S. 937 (1983). Although given the opportunity, the Supreme Court has declined to disturb holdings that double jeopardy applies to non-capital sentencing proceedings. See, e.g. Nelson v. Lockhart, 828 F.2d 446 (8th Cir. 1987), reversed on other grounds, 488 U.S. 33 (1988); French, supra; Bullard v. Estelle, 665 F.2d 1347 (5th Cir. 1982), vacated on other grounds, 459 U.S. 1139 (1983).

The amici position that the double jeopardy clause should depend on the nature of the sentence and not the nature of the sentencing procedures was decided by Bullington and amici has advanced no valid reason to revisit the issue. Petitioners and amici undoubtedly wish this Court to adopt Justice Powell's dissent in Bullington, which was rejected by the majority of the Court when the case was briefed, argued and decided.

The amici argue that Stroud v. United States, 251 U.S. 15 (1919); United States v. DiFrancesco, 449 U.S. 117 (1980); North Carolina v. Pearce, 395 U.S. 711 (1969); and Chaffin v. Stynchcombe, 412 U.S. 17 (1973) require reversal of Bullington. This Court, in its decision in Bullington, addressed and distinguished each of those cases. None involved sentencing procedures which had the hallmarks of a criminal trial. Bullington, supra at 438-446 and thus did not trigger double jeopardy protections.

Petitioners claim that the double jeopardy concerns are "de minimis given the extra constitutional protections [that flow] from the Eighth Amendment." Petitioners' Brief, at 25-26. Citing a long string of United States Supreme Court decisions, amici argue that the death sentence should not be treated differently than other sentences. The death penalty is not an issue in the present case. The amici's concern about death penalty jurisprudence is not properly before this Court. All constitutional rights must be preserved. The suggestion that protection of one right justifies forfeiture of another should be rejected. Garrity v. New Jersey, 385 U.S. 493, 500 (1967).

None of Petitioners' claims either involve important questions of federal law or raise a conflict with federal law. Thus, none of the claims warrant the granting of a Writ of Certiorari by this Court. There is no need to revisit this issue.

CONCLUSION

Respondent Christopher Bohlen respectfully requests this Court deny issuance of a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit and deny reversal of the Eighth Circuit's judgment on the ground that this case should not be reviewed by this Court.

Respectfully Submitted,

RICHARD H. SINDEL, #23406
Counsel of Record

CHERYL A. RAFERT, #30548

Sindel & Sindel, P.C.
8008 Carondelet, Suite 301
Clayton, Missouri 63105
314/721-6040

Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify and acknowledge that I am a member of the Bar of this Court, and that I have served a true and correct copy of the Brief in Opposition to Petition in the case of Paul Caspari v. Christopher Bohlen to all parties involved in the action by mailing a copy of the Brief, first class, postage-prepaid to: Jeremiah W. (Jay) Nixon, Stephen D. Hawke, and Frank A. Jung, Office of the Attorney General, P. O. Box 899, Jefferson City, Missouri 65102 (314) 751-3321 on this 13th day of May, 1993.

Richard H. Sindel
Attorney for Respondent
Christopher Bohlen
Counsel of Record

I hereby certify that on this 13th day of May, 1993, the Brief in Opposition to Petition in the case of Caspari v. Bohlen was mailed to the Clerk of the United States first-class, postage prepaid.

Richard H. Sindel

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No. 92-1500

In The
Supreme Court of the United States
OCTOBER TERM, 1992

PAUL CASPARI, Superintendent
of the Missouri Eastern
Correctional Center, and
JEREMIAH W. (JAY) NIXON,
Attorney General of Missouri — **PETITIONERS**

V.

CHRISTOPHER BOHLEN — **RESPONDENT**

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE **AMICI CURIAE** THE STATES OF ARKANSAS, NEBRASKA, SOUTH CAROLINA, PENNSYLVANIA, TENNESSEE, AND WYOMING IN SUPPORT OF **PAUL CASPARI,** Superintendent of the Missouri Eastern Correctional Center, and **JEREMIAH W. (JAY) NIXON,** Attorney General of Missouri

WINSTON BRYANT
Attorney General of Arkansas

By: JACK GILLEAN
Deputy Attorney General
and KYLE R. WILSON
Assistant Attorney General
200 Tower Building
323 Center Street
Little Rock, AR 72201
(501) 682-3637 or 682-8062

ATTORNEYS for AMICI

PARAGON PRINTING & STATIONERY COMPANY, INC

DON STENBERG
Attorney General of
Nebraska
State Capitol
P. O. Box 98920
Lincoln, NE 68509
(402) 471-2682

ERNEST D. PREATE, JR.
Attorney General of
Pennsylvania
16th Floor
Strawberry Square
Harrisburg, PA 17120
(717) 787-3391

T. TRAVIS MEDLOCK
Attorney General of
South Carolina
P. O. Box 11549
Columbia, SC 29211
(803) 734-3970

CHARLES W. BURSON
Attorney General of
Tennessee
450 James Robertson Pkwy.
Nashville, TN 37243-0485
(615) 741-3491

JOSEPH B. MEYER
Attorney General of
Wyoming
123 State Capitol
Cheyenne, WY 82002
(307) 777-7841

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Superintendent of the
Missouri Eastern Correctional Center,
and JEREMIAH W. (JAY) NIXON,
Attorney General of Missouri

STATEMENT OF THE INTEREST OF THE AMICI CURIAE

Amici curiae are States with capital punishment statutes that support the position of the petitioners, Paul Caspari, Superintendent of the Missouri Eastern Correctional Center, and Jeremiah W. (Jay) Nixon, Attorney General of Missouri, with respect to the question of whether this Court's decision in *Bullington v. Missouri*, 451 U.S. 430 (1981), was correctly decided. In *Bullington*,

the Court applied the Double Jeopardy Clause to sentencing decisions. Amici contend that *Bullington* was incorrectly decided and that this Court should take the opportunity presented in this case to reconsider the issue of whether the Double Jeopardy Clause applies to capital sentencing decisions.

In the ruling below, the United States Court of Appeals for the Eighth Circuit relied on *Bullington* in applying the Double Jeopardy Clause to a sentencing decision in a non-capital case. The sentencing issue in this case was whether the respondent was subject to an enhanced sentence as a persistent offender.

Prior to this Court's ruling in *Bullington*, the Double Jeopardy Clause had never been applied to a sentencing decision. The Amici contend that the protections the Double Jeopardy Clause was designed to enforce are not implicated by permitting successive sentencing proceedings. Therefore, if this Court's decision in *Bullington* is not reversed, the Amici, states with capital punishment statutes, will continue to be barred from seeking a death sentence after a retrial when the first sentencing proceeding resulted in a life sentence.

SUMMARY OF ARGUMENT

The Double Jeopardy Clause was incorrectly applied to capital sentencing proceedings in *Bullington v. Missouri*, 451 U.S. 430 (1981), for several reasons. First, the applicability of the Double Jeopardy Clause should not depend on the procedures employed in sentencing. The majority in *Bullington* applied the Double Jeopardy Clause to capital sentencing proceedings in part because the physical characteristics of a capital sentencing proceeding resembled the guilt/innocence phase of the trial. However, this Court has repeatedly held that the possibility of a higher sentence is a legitimate concomitant of the retrial process in non-capital proceedings. Given the number and magnitude of substantive and procedural safeguards mandated by the Eighth and Fourteenth Amendments, the sentence of death should not be treated differently than any other statutorily authorized sentence.

Second, the applicability of the Double Jeopardy Clause cannot turn on the procedures employed in sentencing because the individual states are constitutionally permitted to enact unique procedures governing capital sentencing proceedings. The Double Jeopardy Clause must receive a more universal and comprehensive application.

Third, even if the applicability of the Double Jeopardy Clause should center upon the specifics of the procedures employed, the mere presence of uniform standards or factors, such as aggravating and mitigating circumstances and the statutorily mandated weighing process, should not be dispositive of the issue. The mere presence of standards employed to channel the jury's

discretion do not in and of themselves invoke the protection of the Double Jeopardy Clause.

Finally, a finding by a jury of a sentence of life does not always indicate a failure of proof upon the part of the State. In *Bullington*, the jury was instructed that it had the discretion to reject a death sentence even if it found an existence of overwhelming aggravating circumstances which outweighed all evidence offered in mitigation and justified a sentence of death. This factor, alone, negates the *Bullington* majority's reasoning that the jury's selection of a life sentence necessarily implies that the State failed to introduce sufficient evidence to support a sentence of death. There are situations when the majority opinion in *Bullington* would prohibit resentencing when there was no failure upon the State's part with regard to its evidentiary proof.

While a sentence of death is certainly severe and non-reversible, it should be no different than any other sentence in the context of the Double Jeopardy Clause. The States should not be precluded from seeking a sentence of death after a retrial when the first trial proceeding resulted in a life sentence.

ARGUMENT

The Amici agree with and adopt the petitioners' argument that this Court's decision in *Bullington v. Missouri*, 451 U.S. 430 (1981) expands the protection afforded by the Double Jeopardy Clause contrary to the original intent of the Clause as articulated by the framers of the Constitution and beyond the traditional protections of the Clause. For the reasons discussed herein, the Amici respectfully submit that this Court should revisit the majority opinion in *Bullington*.

First, the applicability of the Double Jeopardy Clause should not depend upon the procedures employed in sentencing. As the petitioners correctly note, Justice Powell, in his dissent from the majority opinion in *Bullington*, stated that any distinction between the Missouri capital sentencing scheme and those employed in *United States v. DiFrancesco*, 449 U.S. 117 (1980); *Chaffin v. Stynchcombe*, 412 U.S. 17 (1973); *North Carolina v. Pearce*, 395 U.S. 711 (1969) ; and *Stroud v. United States*, 251 U.S. 15 (1919), the leading opinions which hold that the imposition of a greater sentence upon retrial is constitutionally permissible, are "immaterial for purposes of the Double Jeopardy Clause." *Bullington v. Missouri*, 451 U.S. at 448 (n. 2) (Powell, J., dissenting). The Amici contend that Justice Powell was correct.[1]

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[1]Justice Powell was joined in his dissent by Chief Justice Burger, Justice White, and Justice Rehnquist.

In deciding the applicability of the Double Jeopardy Clause, the physical characteristics of the sentencing proceeding or its resemblance to the guilt/innocence phase of a capital murder trial should not be the controlling factors of such an inquiry. Rather, as the dissent correctly noted, "the question is whether the reasons for considering an acquittal on guilt or innocence as absolutely final apply equally to a sentencing decision imposing less than the most severe sentence authorized by law." *Id.* at 450. However, the traditional "reasons" or principles underlying the Double Jeopardy Clause, i.e., the enhanced possibility of conviction, and the repeated and prolonged anxiety placed upon the defendant, are not valid concerns in either the capital or non-capital sentencing contexts. Indeed, this Court has held that "[t]he possibility of a higher sentence [has been] recognized and accepted as a legitimate concomitant of the retrial process." *Id.* at 451 (quoting *Chaffin v. Stynchcombe*, 412 U.S. 17, 25 (1973)). The dissent interpreted this prior ruling to mean that "[t]he possibility of a higher sentence is acceptable under the Double Jeopardy Clause, whereas a possibility of error as to guilt or innocence is not, because the second jury's sentencing decision is as 'correct' as the first jury's." *Id.*

It is clear that such an occurrence does not violate the Double Jeopardy Clause in the non-capital context. *North Carolina v. Pearce*, 395 U.S. 711 (1969); *Moon v. Maryland*, 398 U.S. 319 (1970); *North Carolina v. Rice*, 404 U.S. 244 (1971); *Colten v. Kentucky*, 407 U.S. 104 (1972); *United States v. DiFrancesco*, 449 U.S. 117 (1980). Given the number and magnitude of substantive and procedural safeguards, which this Court has determined are mandated by the Eighth and Fourteenth Amendments, the sentence of death should not be treated

differently than any other statutorily authorized sentence. *Furman v. Georgia*, 408 U.S. 238 (1972); *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffit v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Lockett v. Ohio*, 438 U.S. 586 (1978); *Enmund v. Florida*, 458 U.S. 782 (1982); *California v. Ramos*, 463 U.S. 992 (1983); *Ake v. Oklahoma*, 470 U.S. 68 (1985); *Caldwell v. Mississippi*, 472 U.S. 320 (1985); *Skipper v. South Carolina*, 476 U.S. 1 (1986); *Ford v. Wainwright*, 477 U.S. 399 (1986); *Lowenfield v. Phelps*, 484 U.S. 231 (1988); *Mills v. Maryland*, 486 U.S. 367 (1988); *Booth v. Maryland*, 482 U.S. 496 (1987); *South Carolina v. Gathers*, 490 U.S. 805 (1989); *Penry v. Lynaugh*, 492 U.S. 302 (1989); *Blystone v. Pennsylvania*, 494 U.S. 294 (1990); *McCoy v. North Carolina*, 494 U.S. 433 (1990); *Boyde v. California*, 494 U.S. 370 (1990); *Sawyer v. Smith*, 497 U.S. 227 (1990); *Lewis v. Jeffers*. 497 U.S. 764 (1990); *Sochor v. Florida*, 504 U.S. ____, 112 S.Ct. 214 (1992). Correspondingly, the possibility of receiving the sentence of death upon retrial after a previous sentence of life without parole should be as with any other sentence -- a "legitimate concomitant of the retrial process." *Bullington v. Missouri*, 451 U.S. at 451 (quoting *Chaffin v. Stynchcombe*, 412 U.S. 17, 25 (1973)) (Powell, J., dissenting).

Second, the above argument is bolstered by the fact that individual States are indeed constitutionally permitted to enact procedures substantially and sometimes radically different from those employed in *Bullington*. *See Graham v. Collins*, ____ U.S. ____, 113 S.Ct. 892 (1993); *see also Lowenfield v. Phelps*, 484 U.S. 231 (1988). Given the number of varying procedures which are constitutionally permitted, the petitioners

correctly note that the application of the Double Jeopardy Clause should not turn solely upon the procedures employed by the individual States. The Double Jeopardy Clause should be given a more universal and comprehensive application unobscured by numerous piecemeal exceptions and qualifications.

Third, even if the focus of an inquiry as to the applicability of the Double Jeopardy Clause to the sentencing phase of a capital murder trial should center upon the specifics of the procedure employed and its characteristic resemblance to the guilt/innocence phase, the mere presence of uniform standards or factors, such as aggravating and mitigating circumstances and the statutorily mandated weighing process, should not, in and of themselves, be dispositive of the issue. As the majority correctly noted, the procedure employed in *United States v. DiFrancesco*, 449 U.S. 117 (1980) required a specific showing of additional factors aimed at proving the defendant was a "dangerous special offender." *Id.* Regardless of the distinction drawn by the majority, it is clear that the mere presence of standards employed to channel the jury's discretion do not in and of themselves invoke the protection of the Double Jeopardy Clause. They should have no more significance in the capital sentencing context.

The same is true of the other constitutionally required limitations which are placed upon the capital sentencing jury's discretion. Should the applicability of the Double Jeopardy Clause truly turn upon the number of choices offered to the jury? It is clear that society mandates few punishments it considers appropriate to recompense an offense as serious as capital murder. Simply put, a wide range of possible sentences is neither available nor

appropriate in the context of a capital offense. The mere fact that the capital sentencing jury is faced with fewer choices than its non-capital counterpart should be of no significance.

Finally, with regard to the jury's limited discretion, the *Bullington* dissent correctly noted that a sentence of life does not always indicate a failure of proof upon the part of the State. For example, the jury in *Bullington* was specifically instructed that it had the unfettered discretion to reject a death sentence even if it found the existence of overwhelming aggravating circumstances which outweighed all evidence offered in mitigation and justified a sentence of death. *Bullington v. Missouri*, 451 U.S. at 434-435. This factor, alone, usurps the majority's reasoning that the jury's selection of a life sentence necessarily implies that the State failed to introduce sufficient evidence to support a sentence of death. Therefore, the majority's total reliance upon the sufficiency of the evidence exception established in *Burks v. United States*, 437 U.S. 1 (1978) is misplaced, at least when applied on a wholesale basis with no articulated exceptions. Even where there is no failure upon the State's part with regard to its evidentiary burden, the majority opinion in *Bullington* prohibits resentencing. The majority's reasoning does not account for this situation nor does it allow for the number of possible variations of procedure noted above. The petitioners properly contend that the majority opinion in *Bullington* stretches the parameters of the Double Jeopardy Clause too far.

The Amici agree with the petitioners' contention that, while a sentence of death is certainly severe and nonreversible, and, correspondingly, deserving of

numerous constitutional protections, it should be no different than any other sentence in the context of the Double Jeopardy Clause. A defendant facing retrial with the possibility of life or a large number of consecutive sentences for multiple terms of years is, for all practical purposes, in the same position as the defendant facing death. While there are numerous differences, both philosophically and procedurally, as a base consideration, a multiple offender defendant facing the possibility of, for example, 150 years in prison is no different than the defendant facing death. The only difference is the timing. Each will spend the remainder of his life in prison. There is no reason the non-capital defendant should be treated differently. Pursuant to the long established line of cases preceding *Bullington*, the defendant facing 150 years can be retried and receive the same, or if possible, a greater sentence without any violation of the Double Jeopardy Clause. There should, likewise, be no violation when the capital defendant receives a greater sentence upon retrial. As a practical matter, should the capital defendant who receives a life sentence be afforded greater protection than the non-capital defendant who receives multiple life terms? Should the procedural aspects of the capital sentencing procedure truly be sufficient justification for such a disparity? The Amici contend that they should not.

CONCLUSION

The Amici adopt and agree with the petitioners' arguments and suggest that this Court respectfully grant their petition for certiorari in the above captioned matter.

WINSTON BRYANT
Attorney General of Arkansas

By: JACK GILLEAN
Deputy Attorney General
and KYLE R. WILSON
Assistant Attorney General
200 Tower Building
323 Center Street
Little Rock, AR 72201
(501) 682-3637 or 682-8062

ATTORNEYS for AMICI

(5)

No. 92-1500

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

Paul Caspari, Superintendent
The Missouri Eastern Correctional Center, and
Jeremiah W. (Jay) Nixon,
Attorney General
of Missouri ..... *Petitioners*

vs.

Christopher Bohlen ..... *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

Jeremiah W. (Jay) Nixon
Attorney General of Missouri

Frank A. Jung
Assistant Attorney General
Counsel of Record
P. O. Box 899
Jefferson City, Missouri 65102
(314) 751-3321

Attorneys for Petitioner

PETITION FOR CERTIORARI FILED ON MARCH 5, 1992
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ON WRIT OF CERTIORARI
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JOINT APPENDIX

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Date	Proceedings
Sept 5, 1989	Petition for writ of habeas corpus filed in United States District Court for the Eastern District of Missouri.
May 29, 1990	Habeas corpus (non-death penalty) submitted to Judge Clyde Cahill for determination.
May 30, 1990	Cause assigned to Magistrate David Noce. Show cause order issued.
May 30, 1990	Docket sheet and file forwarded to Magistrate Unit.
June 29, 1990	Motion for extension of time to file responsive pleadings up to 7/29/90 filed by respondent
July 20, 1990	Response to court order filed by respondent w/ exhibits A-G and K-O attached.
Aug. 7, 1990	Request for time within which to respond to the state's answers filed by petitioner, granted.
Sept. 14, 1990	Request for extension of time to file traverse filed by petitioner. Granted.
Sept. 20, 1990	MOTION to correct clerical error in petitioner's request for extension of

	time to file traverse filed by petitioner.
Sept. 28, 1990	TRAVERSE to State's answer filed by petitioner.
Dec. 18, 1990	Magistrate's Report and Recommendations recommending dismissal of petition unless petitioner deletes certain unexhausted grounds for relief.
Dec. 26, 1990	Objections to U.S. Magistrate's Report and Recommendation filed by respondent.
Dec. 31, 1990	Request for additional time until January 4, 1991 to respond to court's order of December 18, 1990 filed by petitioner.
Jan. 4, 1991	Petitioner's motion for extension granted.
Jan. 9, 1991	Response to the Report and Recommendation of the U.S. Magistrate filed by petitioner.
Jan. 11, 1991	Motion of 12/18/90 and file delivered to Judge Cahill.
March 11, 1991	Order returning cause to Magistrate for determination of all non-dispositive matters filed.

April 10, 1991	Response to court's order to show cause why a writ of habeas corpus should not be granted filed by respondent.
April 26, 1991	Request for time within which to file a traverse to respondent's response filed by petitioner.
April 26, 1991	Order providing petitioner to and including 5/3/91 to file a traverse.
May 3, 1991	Traverse to respondent's response and memorandum of points and authorities in support thereof filed by petitioner.
Aug. 14, 1991	Magistrate's Report and Recommendation denying petition for a writ of habeas corpus without further proceedings.
Aug. 26, 1991	Objections to the Report and Recommendation filed by petitioner.
Aug. 28, 1991	ORDERED that the Magistrate's Report and Recommendation is sustained and adopted as order of this court. Further ordered that petitioner's request for a writ of habeas corpus is denied for the reasons set forth.
Sept. 18, 1991	Request for certificate of probable cause by petitioner.

Sept. 18, 1991	Application to proceed without prepayment of costs and affidavit in support by petitioner.
Sept. 18, 1991	Notice of appeal by plaintiff/appellant. Fee in forma pauperis.
Sept. 23, 1991	Petitioner's request for certificate of probable cause denied
Sept. 23, 1991	In forma pauperis is granted
Oct. 7, 1991	Record Delivered to United States Court of Appeals
Oct. 21, 1991	Prisoner Case Docketed in United States Court of Appeals for the Eighth Circuit
Oct. 21, 1991	Motion of appellant Christopher X. Bohlen for appointment of counsel.
Oct. 22, 1991	Letter to United States District Court from United States Court of Appeals for the Eighth Circuit - notice of appeal treated as an application for certificate of probable cause.
Oct. 25, 1991	Appearance for appellee, attorney Frank A. Jung
Nov. 7, 1991	Certificate of Probable Cause granted to the extent that the appeal shall be

	limited to the double jeopardy issue. Clerk of the United States District Court directed to appoint counsel to represent appellant and establish briefing schedule.
Nov. 7, 1991	C.J.A. voucher issued. Richard Holland Sindel of Clayton, MO is hereby appointed under the Criminal Justice Act to represent appellant.
Nov. 7, 1991	Briefing schedule established in United States Court of Appeals for the Eighth Circuit.
Nov. 19, 1991	Appearance for appellant, attorney Richard Holland Sindel.
Dec. 9, 1991	Designation of record received from Appellees.
Dec. 9, 1991	Appearance of Frank A. Jung for respondent received in United States District Court for the Eastern District of Missouri
Dec. 9, 1991	Counter designation of record by respondent.
Dec. 12, 1991	Motion of appellant for extension of time to file brief.

Dec. 13, 1991	Order filed granting in part appellant motion for extension of time to file brief.
Jan. 9, 1992	Brief of appellant filed.
Jan 9, 1992	Records received.
Jan 10, 1992	Case is no longer pro se.
Feb. 13, 1992	Motion of appellees for extension of time to file brief.
Feb. 14, 1992	Order filed granting in part appellee motion for extension of time to file brief.
Mar. 2, 1992	Motion of appellee for extension of time to file brief.
Mar. 2, 1992	Order filed granting appellee motion extension of time to file brief.
Mar. 11, 1992	Brief of appellee received on 3/9/92
Mar. 12, 1992	Appellee's brief to motion practice unit.
Mar. 16, 1992	Records received.
Mar. 18, 1992	Returned from screening.
Mar. 23, 1992	Order filed granting appellant's motion for extension of time to file reply

	brief.
Mar. 27, 1992	Reply brief filed by appellant.
Apr. 27, 1992	Set for argument on June Docket in St. Louis.
June 9, 1992	Argued and submitted in St. Louis to Judges John R. Gibson, Circuit Judge, Gerald W. Heaney, Senior Judge, C.A. Beam, Circuit Judge.
Oct. 16, 1992	The Court: John R. Gibson, Gerald W. Heaney, C.a. Beam. Opinion filed by C.A. Beam PUBLISHED
Oct. 16, 1992	Judgment: John R. Gibson, Gerald W. Heaney, C.A. Beam: The judgment of the District Court is reversed and remanded with directions for proceedings consistent with the opinion of this Court.
Oct. 30, 1992	Motion of appellees Paul D. Caspari and William Webster for extension of time to file petition for rehearing en banc
Oct. 30, 1992	Order granting appellee's motion for extension of time to file petition for rehearing.
Oct. 30, 1992	Appellant's motion for extension of time to file a motion to amend the

	judgment filed.
Oct. 30, 1992	Order filed granting document null.
Nov. 5, 1992	Petition for rehearing with suggestions for rehearing en banc filed by appellees.
Nov. 6, 1992	Motion of appellant to file an amended opinion.
Nov. 16, 1992	Clerk letter sent - Counsel for appellee is directed to file a response.
Nov. 23, 1992	Response of appellee in support of appellant motion to file an amended opinion.
Nov. 27, 1992	Received appellee response to petition for rehearing with suggestions for rehearing en banc.
Dec. 1, 1992	Received reply from Appellant regarding appellees response to appellant's motion to amend judgment.
Dec. 8, 1992	The suggestion for rehearing en banc is denied. Petition for rehearing also denied.
Dec. 11, 1992	Opinion correction.
Dec. 11, 1992	Order granting appellant's motion to file an amended opinion.
Dec. 14, 1992	Motion of appellee to stay mandate.

Dec. 15, 1992	Response by appellant in opposition to appellee's motion to stay mandate.
Dec. 23, 1992	Order denying appellee's motion to stay mandate.
Jan. 27, 1993	Conditional writ of habeas corpus consistent with the opinion of the Eighth Circuit granted by U.S. District Court.
Feb. 1, 1993	Judgment of Eighth Circuit received in District Court
Feb. 2, 1993	Mandate issued
Feb. 3, 1993	Motion to modify District Court order filed by petitioner.
Feb. 4, 1993	Receipt for mandate.
Feb 9, 1993	Records sent out of the office to lower court at the end of appellate proceedings.
Feb. 9, 1993	District Court records receipt of records from Eighth Circuit.
Feb. 11, 1993	Opposition to petitioner's motion to modify District Court's order filed by respondent.
Feb. 19, 1993	Entry of Cheryl A. Rafert on behalf of

	petitioner.
Feb. 19, 1993	Response to respondent's opposition to petitioner's motion to modify court order filed by petitioner.
Mar. 9, 1993	Memorandum and Order granting writ of habeas corpus; further ordered that Circuit Court of St. Louis shall resentence the petitioner without application of persistent offender statute or grant petitioner a new trial.
Mar. 23, 1993	United States Supreme Court notice regarding petition for writ of certiorari.
Mar. 24, 1993	Notice of filing for writ of certiorari received in District Court.

SENTENCING

[P.336] On Friday, October 15, 1982, defendant appeared with his attorney and the State by its attorney, in Cause No. 456384, State of Missouri vs Christopher Bohlen, before Honorable Milton Saitz, Judge, Div. 17, St. Louis County Circuit Court.

APPEARANCES

ATTORNEY FOR STATE.....MRS. VICKI MCKEE
Assistant Prosecuting Attorney

ATTORNEY FOR DEFENDANT..MR. KENNETH LEEDS

JUDGE SAITZ: State of Missouri versus Christopher Xavier Bohlen. Do you have anything outside of what's contained in the court memorandums?

MR. LEEDS: I want to be sure the record is complete. You should have a verified motion for new trial. You should have an amended verified motion for new trial, which would be in paragraph eleven. Is that contained in the file?

THE COURT: Let me check here. Yes.

MR. LEEDS: And Mr. Bohlen also filed his verified motion for a new trial. Aside from that there is a partial transcript of the trial proceedings in which –
(to the court reporter) – I don't know if you provided the Court with a copy –

I will read it into the record. I will make it part of the record as well.

[P.337] THE COURT: Read it in?

MR. LEEDS: I am going to take this up with my motion if you have no objection.

THE COURT: I am not going to hear anything in addition to what you put in your memorandum.

MR. LEEDS: I'd like to acknowledge, file this. Actually what it is, it's supplement paragraph 11.

THE COURT: All right. I'll make this part of the record. This is a partial transcript of the trial?

MR. LEEDS: At the trial. Specifically, regarding the question of whether or not there was a film, piece of surveillance film, and certain comments made by the prosecuting attorney, which I feel were extremely prejudicial, called for a mistrial. And at a certain point in that proceeding you were inclined to grant a mistrial because of certain statements by the prosecuting attorney.

THE COURT: Okay. I will make this part of your motion.

MR. LEEDS: Just as an exhibit to the amended count, Judge?

THE COURT: Yes. Do you have anything else, then, other than this?

MR. LEEDS: You have got the entire record, Judge.

THE COURT: Okay. Do you have anything?

MS. MC KEE: No. The State has nothing.

THE COURT: Will you step up. You are the defendant, Christopher Bohlen; is that right, sir?

DEFENDANT BOHLEN: Yes, sir.

[P.338] THE COURT: All right. Before we begin with the sentencing, for the record the defendant's motion for a new trial will be overruled.

Q Mr. Bohlen, you appeared in this court July 1st of this year, at which time the jury returned a verdict of guilty of robbery in the first degree on Counts I, II and Count III. At that time the verdict of the jury was received and the Court ordered a presentence investigation in this matter by the Missouri State Board of Probation and Parole. I wish to advise you, sir, that the Court has a copy of that report and is aware of its contents. I now ask you, sir, do you or anyone on your behalf have any legal cause to show why sentencing ought not to be pronounced against you at this time?

A Legal motions that my attorney filed for new trial.

Q Aside from those you do not have–

A No, sir, I don't have anything more.

THE COURT: All right. Mr. Leeds, do you know of any legal reason why sentencing should not be pronounced at this time?

MR. LEEDS: As Mr. Bohlen stated, other than what's contained in the record I have no additional grounds.

THE COURT: All right. No legal reason having been shown, which would preclude pronouncement of sentence, the Court will now entertain submissions and evidence relevant to the sentence to be imposed in this case.

Do you have a statement you'd like to make on the record, [P.339] Mr. Leeds?

MR. LEEDS: Well, Judge, I think that the Psi speaks for itself in some degree. I think that Mr. Bohlen's present incarceration has indicated to the prison personnel and the educational staff at the prison that Chris has been a model inmate; that if sentence is passed and it's the Court's decision to incarcerate Mr. Bohlen, that would be considered as a mitigating circumstance, that Mr. Bohlen has shown a very high interest in both developing his mind and that he has conformed to the disciplinary requirements of the county jail very effectively, and he has performed as a model prisoner. In addition to which, if the Court decides that incarceration is required, then Mr. Bohlen be given credit for time served. Other than that, Judge, I believe that, once again, the record is probably complete.

THE COURT: Okay. Mr. Bohlen, do you have anything you wish to say in your own behalf?

MR. BOHLEN: Yes, sir, I do.

THE COURT: Speak up, sir.

MR. BOHLEN: I would like to say, even though--although I have been convicted of these crimes I am actually not guilty of it nor did I have any knowledge of the crime at the time they occurred. And that the way I was convicted, you know, a whole lot of controversial things happened at trial, like the police officer who arrested me showed my picture to a guy, witness, split second, I had reported--[P.340] down.

A That controversial thing that happened and the way that my picture was shown to two eye witnesses that made a split-second i.d. of me and the fact that my counsel, just being the first trial he ever had to try, and with his years of experience, which is a couple of years, of my knowledge being up against a prosecutor like Rick Barry, who has never lost a trial, you know, seems like the odds against me were overwhelming as far as the opposition was concerned. And the people who pulled this robbery reportedly had on ski masks, all of them; I can't, you know, it just really doesn't make any sense to me why I would be perpetrating a crime and go with somebody who robs a place and everybody had on a ski mask and I wouldn't put on one, and put a gun in the person's face to rob them. And I know my presentence report probably has more or less "defamated" my character from previous convictions I have had in the past, none of

which are for robbery, armed robbery. And I never would, I never have or I never would rob anyone no way. I just want for the record to show that. Even though I have been convicted I am actually not guilty of this crime.

THE COURT: Does the State have any comments?

MS. MC KEE: No, your Honor.

THE COURT: All right. The Court being fully informed of the circumstances surrounding the charges and finding no cause [P.341] having been shown which would preclude pronouncement of sentence, it is the sentence of the law and the judgment of this Court that you be sentenced to a term not to exceed fifteen years in the Missouri Department of Corrections on Count I of Robbery in the First Degree. It is the further finding of this Court that you be sentenced to a term not to exceed fifteen years on the charge of robbery in the first degree on Count II. And it is the further order of this Court that you be sentenced to a term not to exceed fifteen years on the charge of robbery in the first degree under Count III. These fifteen-year sentences are to run consecutive. You will be given credit for time served. I will waive the court costs. And, in addition, there will be a judgment entered against you in behalf of the State in the amount of $26.00 pursuant to the Victim Compensation Act.

MR. LEEDS: Can I ask the Court to reconsider, have the sentences to run concurrent as opposed to consecutive.

THE COURT: I have taken that into consideration, and your request will be denied, they will run consecutive. That will conclude the record.

11:35 a.m. – COURT IN RECESS.

IN THE CIRCUIT COURT OF ST. LOUIS COUNTY
STATE OF MISSOURI

STATE OF MISSOURI,	)	
	)	
Plaintiff,	)	Cause No. 456384
	)	
vs	)	
	)	
CHRISTOPHER X. BOHLEN,	)	Div. No. 17
	)	
Defendant.	)	

HONORABLE MILTON SAITZ,
Judge - Div. No. 17

RESENTENCING: Monday, August 13, 1984

TRANSCRIPT OF PROCEEDINGS

ATTORNEY FOR THE STATE:

MS. PHYLLIS WEBER
Assistant Prosecuting Attorney
Courthouse
Clayton, Missouri 63105

ATTORNEY FOR DEFENDANT:

MR. FRANK ANZALONE
111 So. Bemiston - Suite 211
Clayton, Missouri 63105

CERTIFIED COURT REPORTER: MARY F. DOLANSKY - Div. 17

[P.1] On Monday, August 13, 1984, defendant Christopher X. Bohlen, together with his attorney, and the State by its attorney, appeared before HONORABLE MILTON SAITZ, Judge, Div. 17, St. Louis County Circuit Court, in Cause No. 456384.

APPEARANCES

ATTORNEY FOR STATE . . . MRS. PHYLLIS WEBER
Asst. Pros. Atty.

ATTORNEY FOR DEFENDANT . . . . . .
MR. FRANK ANZALONE

MRS. WEBER: Will you mark these,

STATE EXHIBITS A - D, marked for identification

THE COURT: Are you ready to proceed?

MRS. WEBER: Yes.

MR. ANZALONE: Yes.

MRS. WEBER: Your Honor, in accordance with– strike that, please. Defendant was found guilty by a jury July 1st of 1982. And at this time, your Honor, I would like to submit to the Court four prior felony convictions. And the State alleges that defendant is a persistent offender as defined

in 558.016.3, RSMo, and is punishable by sentence to an extended term of imprisonment under 557.036.2(2), 557.036.4 and 558.016.6, RSMo. The State alleges that the defendant has been convicted of four [P.2] prior felonies occurring at different times and not related to this crime. And to substantiate these allegations we are introducing into evidence State's, we are offering into evidence State's Exhibits A, B C and D; State's Exhibit A being a certified and authenticated copy of the judgment and sentence in which the defendant, Christopher Bohlen, on June 20, 1974, was convicted of illegal possession of Schedule One, Controlled Substance, Heroin, and at that time he was sentenced to two years in the Missouri Department of Corrections, this judgment and sentence having taken place in Division 18 of the Circuit Court of the City of St. Louis and State of Missouri.

State's Exhibit B is an authenticated and certified copy of the judgment and sentence from the Circuit Court of St. Clair County and it contains a copy of the Bill of Indictment as well as a copy of the court record of a plea and sentencing. And according to the Bill of Indictment on 11 – it was claimed that on the 11th of September 1975 that Christopher Bohlen committed the crime of violation of controlled substance act, and that on April 14, 1978 in the Twentieth Judicial Circuit of Illinois, St. Clair County, he

was sentenced at that time to a term of three years.

State's Exhibit C, an authenticated certified copy of the Bill of Indictment as well as minutes of the plea and sentencing, according to the Bill of Indictment on April 15, 1975 it was claimed that Christopher Bohlen committed the offense of unlawful [P.3] delivery of controlled substance. And on April 14, 1978 he was sentenced, and he was sentenced on that occasion also to a term of three years. This was also in the Circuit Court of St. Clair County for the Twentieth Judicial Circuit of Illinois.

State Exhibit No. D, also an authenticated and certified copy of the judgment and sentence, includes also a Bill of Indictment and a copy of guilty plea, minutes from the court. It was alleged that on September 4, 1975, Christopher Bohlen committed the offense of violation of controlled substance act. And on April 14, 1978 that he was sentenced to a term of three years in the Circuit Court--pardon me, sentenced to a three-year, term of three years. This occurred in the Circuit Court, Twentieth Judicial Circuit of St. Clair County.

In State's Exhibits B, C and D it is indicated that the defendant appeared in person and with counsel, your Honor.

MR. ANZALONE: In response to that, your Honor, the purpose, of course, we are here is to determine whether the defendant at this time can legitimately be sentenced as a

persistent offender. On the record I would object to the Court considering documents relating to the defendant being a persistent offender for the following reasons. Number one, this case, of course, was already tried one time and the State presented all the evidence or was allowed to present all the evidence it wanted to at that time. And there was no evidence whatsoever presented as to the defendant's record at that time. And apparently the [P.4] Court erroneously sentenced the defendant as a persistent offender because of a combination of failure of the State to prove these allegations and the apparent negligence of his counsel in noticing the State hadn't proved or even brought up in any way these allegations. And so it would be our contention under Brooks versus United States that this, in effect, would be a violation of the defendant's rights, to double jeopardy, because in an entire proceeding the defendant was never proven to be a persistent offender. And this is not a question, as in those cases, where the proof was not valid or where the proof was insignificant or insubstantial. In this case there was no proof.

In addition to this, the second point I would make, as the defendant appears before the Court this morning there is no valid indictment charging him at any time with being a persistent offender. The only valid indictment in this case was an indictment that was returned by the Grand Jury in St.

Louis County which charges him with four counts of robbery. Sometime subsequent to that, February 9, 1982, apparently Mr. Rick Barry or someone from his office put in the file a document which purported to amend that original indictment by way of Information. It would be our contention if the Court examines the court file this was not a valid Information in any way, for two reasons. Number one, if you will notice, it is not verified or signed. It is blank where a verification is supposed to be, the signing. It is not signed by Rick Barry as being verified or [P.5] sworn that it is true, which is one of the essential elements of an Information. In other words, that is blank. Number two, and I think this is equally important, even assuming that that was signed and verified and it was sworn according to the oath of Rick Barry that it was correct, this would not be a valid indictment or Information charging him with being a persistent offender, because the only thing that Mr. Barry claims or alleges on his belief, in effect, would be the four counts in this case. And the allegations of the persistent offender are actually underneath Mr. Barry's signature and not above it. And while I have never been able to find a case in Missouri on this point as to where the signature is transposed, I think a valid analogy would be in the case of where there is a legal pleading and there is a certificate of service, there is a case that the signature must be under the

certificate of service to verify the entire contents of the petition rather than in the middle of the petition and before the certificate of service. So, in effect, looking at it on the face of this, first of all, Rick Barry didn't verify this was correct or true; and, secondly, if he did verify it was correct and true, under the form the only form he verified was correct and true was Counts One through Four and did not verify in any way the allegations of persistent offender. That is nothing but a piece of paper stuck in the file. I don't think you can argue the defendant waived his right to have a verified Information in the trial, by any means, by going [P.6] to trial. Because, again, I think this would be different from those cases. In this case it is our contention that there was actually a valid Information -- Indictment in the file, the defendant was validly indicted by a grand jury and there was a valid trial conducted and the defendant was not accorded his right to be sentenced by a jury because there is no document in that file that can be a valid Amended Information. For those two reasons. And, so, I would also object to the Court considering these other documents, therefore, as Ms. Weber as presented, on the grounds this is irrelevant, no specific allegations charging him as a persistent offender that's valid.

MRS. WEBER: Your Honor, he was sentenced to fifteen years on each Count on a Class A felony. Class A

felony is ten to thirty years anyway. If you were to sentence him to 15 years in the penitentiary, a Class A felony, it is in accordance with the term of years anyway.

MR. ANZALONE: If I can respond to that. The issue before us, which the Court of Appeals recognizes in its decision, is that unless the defendant is proven to be a persistent offender and is validly pled the defendant has a constitutional right to be sentenced by the jury and to have the jury determine his sentence, which did not happen in this case. There is no question from the Court of Appeals Opinion unless we can validly prove the defendant was charged and is a persistent offender the case must be remanded. In other words, the fact that you [P.7] sentenced him and you gave him a sentence within the-- for the time frame, which was not enhanced, is irrelevant to the issues before you.

MRS. WEBER: As far as his being a persistent, a prior offender, however, I would point out to the Court that this case was returned by the Court of Appeals for the very purpose that we are here today. And I think that as far as the claim of double jeopardy, I am not so sure, Mr. Anzalone, that that applies to sentencing.

MR. ANZALONE: It is my contention that it does. But that was in the Court of Appeals decision. I guess what we are here today to determine is, number one, validated

charges of persistent offender; number two, whether that can be proven. If we get past that argument, I have other arguments about the specific documents Mrs. Weber has introduced. I don't think we will ever get to that if we assume there is no valid Information charging him as a persistent offender; he certainly could never be sentenced, so the documents would be irrelevant.

THE COURT: Well, is that in the form of a motion or what?

MR. ANZALONE: It would be an objection to the Court proceeding at this time and receiving those documents on the ground it would be irrelevant, on the ground that the defendant has not ever been pleaded to be a validated persistent offender.

THE COURT: For the record, the defendant's objection will be overruled. The Court does find that the defendant is [P.8] properly charged and is properly pleaded, with regard to being a persistent offender. Are you offering A through D at this time?

MRS. WEBER: Yes, sir.

MR. ANZALONE: Can I object? I have the following objections to those. As to Exhibits Nos. B, C and D, there is no showing whatsoever that they relate to the same individual who is standing before you, Christopher Xavier Bohlen, who is charged with being in the indictment

in this case. The only thing the State I suppose can rely on in this case is the so-called principle of identity of names whereas there is an assumption if the person has the same name it is the same person. In this case the three Illinois convictions are for a person, B-O-L-E-N, Christopher Bolen, which is a different person or at least there is no showing it's the same person as the defendant in this case. So, in the absence of any further proof that those documents refer to the man in front of you, the conflict of identity of names does not apply.

MRS. WEBER: Would you mark this.

STATE EXHIBIT E - marked for identification.

MR. ANZALONE: In addition, 557.036, Statute under which the State is attempting to proceed at this time, that changed the old Habitual Offender Statute and worded it differently in that the requirement now for the State is that they must prove [P.9] that the defendant was previously convicted of felonies, not merely crimes, that would be felonies if they were committed in Missouri. There is a recent case on this that says if something is a felony in another state that would suffice for whether it is a felony in Missouri or not. Those three documents, B, C and D, do not indicate in any way the defendant pled to or was found guilty

of anything that was a felony in the State of Illinois and therefore they would be irrelevant to our proceedings absent further proof that those were in fact felonies the defendant pled guilty to and was sentenced to. In addition, in so far as the Exhibit A is concerned, again I would object to the reception of that on the grounds that, number one, the identify of names does not apply. There is no showing that this applies to this specific man, Christopher Xavier Bohlen, as he is charged with being, in that this is a sentencing purported to be of a Christopher Bolen. In addition to that, there is no showing on this document, State Exhibit A, that at the time the defendant was-- pardon me, pled guilty he was represented by an attorney, as is one of the requirements under the Missouri constitution and the statutory construction thereof. This merely shows he was represented by an attorney at the time of sentence. It does not show an attorney at the time of the plea of guilty, merely mentions having pled guilty on a prior date. And I would also object to each and every one of the documents on the grounds they are not self-authenticated. We [P.10] have no testimony here from anyone who allegedly authenticated those documents, that in fact the individuals who signed them are in fact individuals who hold the positions that they purport to hold. I don't think the Court can take notice of that since A, B, C and D are all documents which purport to come from

another jurisdiction other than St. Louis County.

MRS. WEBER: Do you want me to answer?

THE COURT: No; it won't be necessary. Do you have another exhibit?

MRS. WEBER: Well, it was merely-- I was just checking it, but--

THE COURT: Well, for the record, the defendant's objection to the State Exhibits A through D will be overruled. Consequently, Exhibits A through D will be received in evidence. Do you have anything else?

MRS. WEBER: No.

MR. ANZALONE: We have no evidence.

THE COURT: Let the record show that the Court finds the defendant is a persistent offender as defined in Chapter 558.016.3 and consequently punishable by a sentence, by sentence of extended term of imprisonment under Section 557.036, and finds that the defendant has been previously convicted of four felonies committed at different times and not related to this crime for which he is charged.

MRS. WEBER: Your Honor--

[P.11] (OFF THE RECORD DISCUSSION.)

THE COURT: And let the record further show that the Court finds the defendant is a prior offender. Before we

go into the actual sentencing we did have a couple of preliminary matters to take up. One is your motion, first of all, for a change of judge. Do you want to speak on behalf of that motion?

MR. ANZALONE: My own contention would be in this case this was remanded for sentencing where the defendant was sentenced as a persistent offender by the Court, and apparently through a combination of factors. At the time the Court sentenced him there was no evidence before the Court as to his record and while true the Court acted in good faith at the time, I am not claiming that the Court didn't, I think that that fact alone would be sufficient for the Court to either act on our motion to disqualify itself or its own motion.

THE COURT: Mrs. Weber, do you have anything to say on that?

MRS. WEBER: Your Honor, you heard the evidence in the case. I think it is without question you are the appropriate person to do the sentencing. I don't think there is any reason that would call for either you disqualifying yourself or the defendant doing so.

THE COURT: All right. For the record, the defendant's motion for a change of judge will be overruled.

MR. ANZALONE: In addition, your Honor, we have filed a motion before you for a presentence

investigation, and I would [P.12] ask that you grant this for the following reasons. Number one, it's been a few years since the defendant was sentenced by the Court. In that time he's been involved in several programs in the penitentiary, including a school that he is in now. And I think before sentencing him, as a matter of fairness, the defendant requests that you consider his present suitability for a specific sentence rather than possibly a suitability based upon a presentence investigation two years ago. And the second reason I'd ask for this would be that I am more or less indicated the defendant's family-- based upon a comment the Court made, I don't think it would be any great inconvenience to the system and would be fair for the defendant and for the Court to receive a statement of his present background.

THE COURT: Mrs. Weber?

MRS. WEBER: Your Honor, a presentence investigation was completed at the time of the trial. The Judge-- you had information before you, and you have his background before you. This was two years ago. If you decide not to do a presentence after trial you don't even have to do so. And I think if the defendant is conducting himself in an exemplary fashion I think that's something for the authorities at Jefferson City to take into consideration, not this Court.

THE COURT: Mr. Anzalone, I indicated to you at the time you filed a motion for a presentence investigation and report by the Missouri State Board of Probation and Parole that I didn't [P.13] have any, at the time of filing it I didn't have any serious objection to it. But having had a chance to review the file, the entire matter, I am of the opinion that since there was a presentence investigation and report furnished the Court in August, as a matter of fact on August 25, 1982, I am going to deny a request at this time for an additional presentence investigation. Anything else?

MRS. WEBER: No, your Honor.

MR. ANZALONE: No other comments.

THE COURT: You are the defendant, Christopher Bohlen; is that right, sir?

DEFENDANT BOHLEN: Yes, sir.

Q Mr. Bohlen, I now ask you, sir, do you or anyone on your behalf have any legal cause to show why sentencing should not be pronounced against you at this time?

A Your Honor, my attorney said anything-- I wouldn't know about the legal.

MR. ANZALONE: On the record, I would reemphasize the legal causes we mentioned before and repeat them as a grounds for impediment to the court sentencing.

THE COURT: The Court having been fully informed of the circumstances surrounding these charges and finding

no cause having been shown which would preclude pronouncement of sentence, the Court will now entertain submissions and evidence relevant to the sentence to be imposed in this case. Do you have anything [P.14] you'd like to say in your own behalf at this time?

MR. BOHLEN: No, sir.

MR. ANZALONE: Explain to the Judge you have been involved in prison-- not legal reasons, but--

MR. BOHLEN: Since my incarceration I have been going to engineering drafting school and I have been diligently engaged in there making good grades. And I haven't had any institutional write-up, you know, for any kind of bad behavior, anything like that. And I have been a model prisoner. If I had to be sentenced at the time, which if I had to, if the sentence could run concurrent instead of consecutive, to save time, than the way they are now.

MR. ANZALONE: In addition to what he said, your Honor, there are several changes that have come about since the defendant was sentenced. Number one being the fact that he has made a valid effort, I think, to improve himself and to try to make something of his capabilities. In addition to that, the defendant is presently married to his wife, Talani Bohlen, who is an employee of the phone company, who has been, it is my experience from having contact with her at least 25 times in the last year-and-a-half or so, is a very

stabilizing influence on him. And she is here this morning showing an interest in him. I think she has changed him as a person. And while I think in light of the Court's prior sentence it is unrealistic to ask that the Court consider probation, I do think that it may be [P.15] realistic for the Court to reconsider its prior sentencing because, as the PSI indicates, the defendant's background of convictions is entirely for nonviolent offenses; in fact, most of them, as you have before you, involve drugs, drug use in some way, or stealing of some type. And I think the presentence investigation would show and trial testimony would show that, though the defendant professes his innocence, even if he were involved in this it would be part of a large group of people led by someone else, not led by the defendant, even according to the State's allegations. And I think since he's gotten away from those people there would be a realistic chance if he served a realistic sentence that possibly he may have some day been able to come out and be a benefit to society. I think if the Court would sentence him with these consecutive sentences it would make his future release anywhere in the early future highly unlikely, he'd have to serve one right after another. I'd ask the Court to maybe consider modifying the sentence in such a way to make them concurrent, more in line with possibly encouraging the defendant's hopes to some day become a productive member

of society.

THE COURT: Mrs. Weber?

MRS. WEBER: I have no comments.

THE COURT: The Court having found no causes having been shown which would preclude pronouncement of sentence, it is the sentence of the law and the judgment of this Court that you be [P.16] remanded to the custody of the Department of Justice Services to be imprisoned in the Missouri Department of Corrections for a term not to exceed fifteen years on Count One, charge being Robbery in the First Degree, Class A Felony. It is the further order of this Court that you receive a fifteen-year sentence on Count Two of Robbery First Degree, Class A felony. And that fifteen-year sentence will run consecutive with the fifteen-year sentence on Count One. Further order of this Court that you receive a term of imprisonment with regard to Count Three, the charge being Robbery First Degree, Class A Felony, and that fifteen-year sentence will run consecutive with the fifteen-year sentence in Count Two. I will waive the court costs and that will conclude the record.

CERTIFICATION OF COURT REPORTER

I, MARY F. DOLANSKY, do hereby certify that I am the Official Court Reporter in Div. 17, St. Louis County Circuit Court, and was acting in said capacity during the within proceedings.

I have prepared this verbatim transcript of proceedings on Monday, August 13, 1984, State vs Christopher Bohlen, Cause No. 456384.

(s) Mary F. Dolansky

IN THE
MISSOURI COURT OF APPEALS
EASTERN DISTRICT

DIVISION THREE

STATE OF MISSOURI,	)	
	)	No. 46436
Plaintiff-	)	Appeal from the
Respondent,	)	Circuit Court of
	)	St. Louis County
vs.	)	
	)	Hon. Milton Saitz
CHRISTOPHER XAVIER	)	Judge
BOHLEN,	)	
	)	OPINION FILED:
Defendant-	)	April 17, 1984
Appellant.	)	

Defendant-appellant was found guilty by a jury of three counts, each charging robbery in the first degree, §

569.020, RSMo 1978. He was sentenced by the court as a persistent offender, § 558.016.2, RSMo 1978, to serve consecutive fifteen-year sentences on each count.

The state charged that the defendant, acting with others, on April 17, 1981, entered a jewelry store in St. Louis County, Missouri, and took currency and jewelry from the store, Count I, a wristwatch from the manager of the store, Count II, and a wristwatch from the female employee, Count III. The manager of the store, a female employee and two customers were forced at gunpoint to a back room and ordered to lie on the floor. Witnesses saw four black males and two black females run from the store.

Identification was the central issue. Two witnesses were able to identify the defendant as being one of the robbers. There was evidence connecting the defendant with a cigarette lighter of the type of some lighters taken in the robbery. The defendant called three witnesses all of whom were in the vicinity of the robbery at the time of the occurrence and all of whom were unable to identify him as one of the robbers.

Appellant challenges the convictions on three grounds. First, he contends that the court erred in failing to dismiss Count III at the close of the state's case because the state failed to call the female employee whose wristwatch was taken in the robbery. Defendant maintains that he was

thereby denied his constitutional right to confrontation and cross-examination guaranteed under the Sixth Amendment of the Federal Constitution and applicable in this state under the Fourteenth Amendment. Second, defendant contends that the Court lacked jurisdiction to complete the trial because the judge granted a motion for mistrial during the state's closing argument. In the alternative, defendant contends that the requested mistrial was required by timely objection to the prosecutor's prejudicial closing argument. Third, the defendant contends the punishment should have been imposed by a jury as the state failed to prove that he was a persistent offender.

Appellant's first point is without merit. The Sixth Amendment guarantees a defendant in a criminal case the right "to be confronted with the witnesses against him" but it does not require the state to produce each and every witness who might present relevant testimony at trial. United States v. Polisi, 416 F.2d 573, 579 (2nd Cir. 1969). See State v. Smith, 632 S.W.2d 3, 5 (Mo.App. 1982). The constitutional guarantee of the Sixth Amendment is one of exclusion rather than mandatory inclusion. Invocation of the Sixth Amendment requires that evidence offered be excluded absent an opportunity by the defendant to test its credibility and probability by cross-examination. Ohio v. Roberts, 448 U.S. 56, 64 (1980). In this case, no such evidence was

offered. The store manager testified that when threatened at gunpoint, he gave his wristwatch to one of the robbers and he helped remove the female employee's wristwatch and handed it to the same person. By this testimony alone the state made a submissible case on Count III. It was not necessary to have the testimony of the owner of the wrist watch. Defendant's right to confrontation was not violated by her absence at trial. Turnbough v. Wyrick, 420 F.Supp. 588 (E.D.Mo. 1976) aff'd 551 F.2d 202 (8th Cir., 1977).

An understanding of the defendant's contention of error directed to his request for a mistrial requires additional facts. The store manager testified that a surveillance system camera was operating during the robbery and that after the robbery he gave the film to a police officer. The manager later viewed the film at a police station but the film was not offered in evidence.

In the opening portion of the state's closing argument the state argued "I believe the state has given you all the evidence you need to convict in this case." The defendant responded by arguing, "perhaps the most significant item in this whole case is something that you haven't seen, something that I haven't seen, something that none of us will ever see ... Cameras are not like the human mind; they record exactly what they see." Thereafter, in the final portion of the state's closing argument the prosecutor told the jury, "The

law obligates me, absolutely obligates me, to provide the defense with any information I have that will either condemn or exculpate the defendant." Defendant's objection that the state was arguing law and not evidence was properly sustained. State v. Holzwarth, 520 S.W.2d 17, 22 (Mo. banc 1975). Immediately thereafter, the prosecutor told the jury, "I assure you if I had a film that showed him, I'd show it to you. He knows that there was a film taken. He also knows that it didn't show a darn thing." The court sustained a general objection to that statement and the prosecutor thereafter immediately said, "There is no film."

Outside of the hearing of the jury the defendant requested a mistrial and the court said, "I'll grant it." In an effort to save the proceeding the prosecutor explained that he thought that the court's rulings referred only to not arguing the law, offered an apology, and urged the court not to grant the mistrial. The prosecutor then suggested that "the jury be instructed to disregard what I have just argued, that you personally reprimand me for arguing before the jury. ... Reprimand me and instruct the jury that they must disregard what I have just said." Defense counsel suggested that if the judge was inclined to rule in favor of the prosecutor then "I would only re quest the court to make a statement that there was a film, to counteract the statement of counsel." Following a discussion off the record the court overruled the

defendant's request for a mistrial. The court then announced to the jury, "Ladies and gentlemen of the jury, the court warns you to disregard the last statement of counsel." The court neither reprimanded the prosecutor nor did he make a statement about the existence of the film.[1]

Appellant here contends that when the court sustained the motion for a mistrial jurisdiction to proceed was lost. This contention is simply not supported by the record. What occurred out of the hearing of the jury was an announcement by the court that he intended to grant a mistrial. After further argument he reversed his position. The initial statement was nothing more than an indication of intention at a time when the declaration of a mistrial was within the discretion of the court. State v. O'Neal, 618 S.W.2d 31, 35 (Mo. 1981). The jury never heard the motion for a mistrial or the ruling. No announcement was made to the jury nor did the court announce a declaration of mistrial. In addition, the defendant recognized the possibility that the proceeding would continue and requested alternative relief in the event a mistrial was not declared. The court granted the alternative request in so far as possible. No prejudice resulted. State v.

[1]There being no evidence that the film did not exist the court committed no error in not stating as a fact that it did not exist.

Harry, 623 S.W.2d 577, 579 (Mo.App. 1981).

In the second part of his argument for a mistrial the defendant contends that a mistrial was required because of the prejudicial effect of the prosecutor's statements concerning the film and his obligation to present the film to the defendant. There was no evidence to support the prosecutor's statement that the film did not exist. The evidence indicated that the film was delivered to a police officer and later viewed by the store manager. Absent evidence which described the history of the film from the time it was seen by the manager until the date of the trial is not proper for the prosecutor to argue either the duty of the state to produce it or what it may have disclosed. See State v. Moore, 428 S.W.2d 563, 565 (Mo. 1968).

The state's failure to justify non-production of the film once its' existence was established entitled the defendant to an inference that the contents of the film were unfavorable to the state's case. State v. Collins, 350 Mo. 291, 165 S.W.2d 647, 649 (1942). Defense counsel properly made that argument in his closing statement. The prosecutor's attempt to deny the defendant the benefit of the inference by asserting the film did not exist and that it did not show a darn thing was improper. Argument not supported in evidence or a misstatement of the evidence is generally regarded as error, especially if the statement of facts not in

evidence is willful. State v. Swing, 391 S.W.2d 262, 265 (Mo. 1965). This type of conduct is particularly prejudicial where the prosecutor argued a matter immediately after the court sustained an objection in that regard. State v. Ralls, 583 S.W.2d 289, 292 (Mo.App. 1979). In the case at bar the prosecutor continued to discuss the film after an objection and after an earlier statement by the judge, during the state's case, to bring in the film. In this case we find that any error was not prejudicial because the jury admonition to disregard the prosecutor's comment was adequate to cure the prejudicial effect. State v. Wren, 643 S.W.2d 800, 802 (Mo. 1983).

Defendant's third point of error concerns sentencing. Our search of the record indicates that although the defendant was sentenced by the judge as a persistent offender no proof was made of the prior convictions. We requested the parties to supplement the record to prove that the prior convictions were presented to the court. No such proof was furnished. We remand for a hearing on the allegations of the prior convictions. If the prior convictions are proved defendant should be resentenced. State v. Holt, 660 S.W.2d 735, 739 (Mo.App. 1983). If the prior convictions are not proved the trial court judgment is reversed and defendant shall receive a new trial in order that a jury may consider all the issues.

Defendant's conviction is affirmed but the sentence is

reversed and remanded for resentencing based upon the evidence of prior convictions.

--Kent E. Karohl--
KENT E. KAROHL,
Presiding Judge

JAMES R. REINHARD, Judge Concurs
WILLIAM H. CRANDALL, JR., Judge Concurs

No. 92-1500

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1992

Paul Caspari, Superintendent of
the Missouri Eastern Correctional Center,
and Jeremiah W. (Jay) Nixon,
Attorney General of Missouri,
Petitioners,
v.
Christopher Bohlen,
Respondent,

On Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

Brief for Petitioners

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri

FRANK A. JUNG
Assistant Attorney General
Counsel of Record
P. O. Box 899
Jefferson City, Missouri 65102
(314) 751-3321

Attorneys for Petitioners

Questions Presented

I.

Whether the double jeopardy clause which prohibits the state from subjecting a defendant to successive capital sentencing proceedings should apply to successive non-capital sentence enhancement proceedings.

II.

Whether this Court's decision in *Bullington v. Missouri*, 451 U.S. 430 (1981) extends the protection afforded by the Double Jeopardy Clause contrary to the original intent of the clause as articulated by the terms of the Constitution and beyond the traditional protection of the clause.

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Brief for the Petitioners

Opinions Below

The opinion of the United States Court of Appeals for the Eighth Circuit is reported as *Bohlen v. Caspari*, 979 F.2d 109 (8th Cir. 1992) and is reported in the Appendix to petitioners' petition for writ of certiorari. Appendix at A-3. The Order of the United States District Court for the Eastern District of Missouri is not reported but is included in that appendix at A-25. The Magistrate's report and

recommendation is not reported but is included in that appendix at A-27.

Jurisdictional Statement

The United States Court of Appeals for the Eighth Circuit issued its opinion on October 16, 1992. The motion for rehearing or rehearing en banc was denied on December 8, 1992. This Court has jurisdiction to review the instant case by writ of certiorari. This Court's jurisdiction to review the instant case by means of the writ of certiorari is set forth in 28 U.S.C. § 1254(1). Petitioners, Paul Caspari and Jeremiah W. (Jay) Nixon, timely filed their petition for writ of certiorari on March 5, 1993. This Court granted petitioners' petition seeking the issuance of a writ of certiorari to the United States Court of Appeals for the Eight Circuit on June 14, 1993.

Constitutional Provisions

The Fifth Amendment of the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless in a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service

> in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section One of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 558.016, RSMo 1986, in pertinent part, provides:

> 1. The court may sentence a person who has pleaded guilty to or has been found guilty of a class B, C, or D felony to a term of imprisonment as authorized by section 558.011, if it finds the defendant is a prior offender, or to an extended term of imprisonment if it finds the defendant is a

persistent offender or a dangerous offender.

2. A "prior offender" is one who has pleaded guilty to or has been found guilty of one felony.

3. A "persistent offender" is one who has pleaded guilty to or has been found guilty of two or more felonies committed at different times.

* * *

6. The total authorized maximum terms of imprisonment for a persistent offender or a dangerous offender are:

(1) For a class A felony, any sentence authorized for a class A felony;

(2) For a class B felony, a term of years not to exceed thirty years;

(3) For a class C felony, a term of years not to exceed fifteen years;

(4) For a class D felony, a term of years not to exceed ten years.

Section 558.021, RSMo 1986 provides:

1. The court shall find the defendant to be a prior offender, persistent

offender, or dangerous offender, if

(1) The indictment or information, original or amended, or the information in lieu of an indictment pleads all essential facts warranting a finding that the defendant is a prior offender, persistent offender, or dangerous offender; and

(2) Evidence is introduced that establishes sufficient facts pleaded to warrant a finding beyond a reasonable doubt that the defendant is a prior offender, persistent offender, or dangerous offender; and

(3) The court makes findings of fact that warrant a finding beyond a reasonable doubt by the court that the defendant is a prior offender, persistent offender, or dangerous offender.

2. In a jury trial, the facts shall be pleaded, established and found prior to submission to the jury outside of their hearing, except the facts required by subdivision (1) of subsection 4 of section 558.016 may be established and found at a later time, but prior to sentencing, and may be established by judicial notice of prior testimony before the jury.

3. In a trial without a jury or upon a plea of guilty, the court may defer the proof and findings of such facts to a later time, but

prior to sentencing. The facts required by subdivision (1) of subsection 4 of section 558.016 may be established by judicial notice of prior testimony or the plea of guilty.

4. The defendant shall be accorded full rights of confrontation and cross-examination with the opportunity to present evidence, at such hearings.

5. The defendant may waive proof of the facts alleged.

6. Nothing in this section shall prevent the use of presentence investigations or commitments under sections 557.026 and 557.031, RSMo.

7. At the sentencing hearing both the state and the defendant shall be permitted to present additional information bearing on the issue of sentence.

Statement of the Case

Respondent was charged with robbing Blust Jewelry Store at the Town and Country Mall in St. Louis County, Missouri. Respondent took currency and jewelry from the store and wristwatches from two employees. Respondent was convicted in the Circuit Court of St. Louis County,

Missouri, on three counts of the class A felony of robbery first degree, § 569.020, RSMo 1986, and sentenced as a prior and persistent offender under § 558.016.3, RSMo 1986, to consecutive terms of fifteen years imprisonment on each count. The Circuit Court, however, made no findings of fact that the defendant was a prior and persistent offender as required by §558.021.1(3), RSMo 1986. The conviction was affirmed on direct appeal by the Missouri Court of Appeals. *See State v. Bohlen*, 670 S.W.2d 119 (Mo.App. 1984) (A-63). However, the Court of Appeals remanded the cause for a determination of respondent's status as a prior and persistent offender. *Id.* On remand, the Circuit Court of St. Louis County found respondent to be a prior and persistent offender (J.A. 29) after receiving evidence that respondent had prior convictions for possession of heroin (J.A. 19), unlawful delivery of a controlled substance and two (2) counts of violation of Illinois' Controlled Substance Act (J.A. 20-21)(A-75). The Court again sentenced respondent to consecutive terms of fifteen years imprisonment on each count. The sentences were affirmed on appeal after remand. *See State v. Bohlen*, 698 S.W.2d 577 (Mo.Ct.App. 1985) (A-57).

Respondent also filed a post-conviction relief motion in the Circuit Court of St. Louis County, under former Missouri Supreme Court Rule 27.26 (repealed effective

January 1, 1988). Upon denial of that motion respondent appealed the Circuit Court's judgment, and the Missouri Court of Appeals affirmed. *See Bohlen v. State*, 743 S.W.2d 425 (Mo.Ct.App. 1987).

On September 5, 1989, respondent filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 in the United States District Court for the Eastern District of Missouri (A-84). After responsive pleadings, Magistrate David Noce recommended that respondent's petition be denied. The Honorable Clyde Cahill sustained and adopted the Magistrate's Report and Recommendation and denied respondent's petition on August 28, 1991 (A-25).

The United States Court of Appeals for the Eighth Circuit reversed and remanded the District Court's denial of respondent's petition for a writ of habeas corpus on October 16, 1992. *See Bohlen v. Caspari*, 979 F.2d 109 (8th Cir. 1992) (A-3). The Court held that respondent's double jeopardy rights had been violated by the Missouri Court of Appeals' remand of the case to the circuit court for a determination of respondent's prior and persistent offender status. The Federal Court of Appeals ordered respondent released from the custody of petitioners unless the state resentenced respondent without invoking the recidivism statute. Rehearing and rehearing *en banc* were denied on December 8, 1992 (A-83).

Summary of the Argument

This Court should reverse Court of Appeals because this Court has never held, and should not now hold, that the Double Jeopardy Clause applies to non-capital sentence enhancement proceedings. Indeed, this Court has previously declined to extend the Double Jeopardy Clause to non-capital sentence enhancement proceedings, *United States v. DiFrancesco*, 449 U.S. 117 (1980), and expressly reserved this issue in *Lockhart v. Nelson*, 488 U.S. 33, 37 n.6 (1988). This Court's expressed justifications for extending the Double Jeopardy Clause to capital sentencing proceedings in *Bullington v. Missouri*, 451 U.S. 430 (1981), do not exist in non-capital sentence enhancement proceedings. Thus, the Court of Appeals' application of *Bullington* to this case was error.

Extension of the Double Jeopardy Clause to non-capital sentence enhancement proceedings also is barred in this case under *Teague v. Lane*, 489 U.S. 288 (1989). This case is before the Court on collateral review. As pointed out above, this Court has never extended *Bullington* to non-capital sentence enhancement proceedings. Such an extension is not "dictated" by current federal Constitutional law. Moreover, the state court's determination that the Double Jeopardy Clause does not apply to non-capital

sentence enhancement proceedings was a good faith interpretation of existing case law at the time of respondent's appeal. *Butler v. McKellar*, 494 U.S. 407, 414 (1990). For all these reasons, any determination that the Double Jeopardy Clause extends to non-capital sentence enhancement proceedings cannot be applied to this case.

If this Court were to determine that under *Bullington* the Double Jeopardy Clause applies to non-capital sentencing proceedings, this Court should then consider whether *Bullington* should be overruled. There can be little quesstion that *Bullington* extends the protections offered by the Double Jeopardy Clause beyond the original intent of the framers and beyond the Clause's traditional protections.

Before *Bullington*, this Court never applied the Double Jeopardy Clause to sentencing that did not involve multiple punishments. *Bullington's* justifications for extending the Clause to capital sentencing proceedings do not pass rationale scrutiny. *Bullington v. Missouri, supra*, 451 U.S. at 448, n.2 (Powell, J. dissenting). Simply because the first jury declined to impose the death penalty does not establish, contrary to the implication of *Bullington*, that the prosecution failed to prove its case. *See Poland v. Arizona*, 476 U.S. 147, 155 (1986). Because the jury may have decided to grant a defendant mercy, the first jury's decision cannot constitute an implied acquittal of the death penalty,

nor can it constitute insufficient evidence for the death penalty. Under Missouri law, a jury need not determine that the aggravating circumstances do not exist in order to sentence a defendant to life imprisonment. A jury may do so even if all the aggravating circumstances are proved beyond a reasonable doubt. Thus, the jury's discretion in sentencing is greater than that of a jury during the guilt or innocence phase. Because *Bullington* extended the Double Jeopardy Clause far beyond what was intended by its framers and misinterpreted Missouri law while doing so, it should be overruled.

ARGUMENT

I.

The double jeopardy clause should not apply to successive non-capital sentence enhancement proceedings.

This case gives the Court the opportunity to limit the Double Jeopardy Clause principles announced in *Bullington v. Missouri*, 451 U.S. 430 (1981), to capital punishment cases.[1] *Bullington* should not be extended to non-capital sentence proceedings because non-capital sentencing proceedings do not inherently have the characteristics of a trial which allow for opening statements, testimony, introduction of evidence, jury instructions, final arguments and jury deliberations. Furthermore, non-capital sentencing proceedings allow a broad range of punishment as compared to the life-or-death option in capital sentencing proceedings. Likewise, the theory that "death is different" has no application in non-capital sentencing proceedings. Prior precedents, along with underlying logic and policy concerns,

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[1]Double Jeopardy protects against a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711 (1969). Double Jeopardy is enforced against the States through the Fourteenth Amendment *Benton v. Maryland*, 395 U.S. 784 (1969). None of these protections are implicated in this case.

establish that this Court should conclude that if the Double Jeopardy Clause has a role in sentencing proceedings, this role should be limited to capital sentencing proceedings only.

In *Bullington*, a slim majority of this Court held that Missouri's capital sentencing proceedings, which it characterized as "unique", *Id.*, 451 U.S. at 441, n.15, so resemble a criminal trial that they are subject to the Double Jeopardy Clause. That "uniqueness" is because capital sentencing proceedings entail opening statements, testimony, introduction of evidence, jury instructions, final arguments, and jury deliberations. *Id.*, 451 U.S. at 438, n.10. At Mr. Bullington's first trial he was convicted of capital murder and sentenced by the jury to life imprisonment. He successfully appealed his conviction and, before the second trial, the State gave notice that it would again seek capital punishment. Mr. Bullington's appeal eventually reached this Court, and this Court held that the Double Jeopardy Clause prohibited the State from seeking capital punishment after it unsuccessfully sought it at the first trial. This Court held that the procedural differences in capital sentencing proceedings contained in Missouri law, which include a bifurcated guilt and sentencing proceeding, was the "underlying rationale" of applying the Double Jeopardy Clause to capital sentencing proceedings. *Bullington v. Missouri*, *supra*, 451 U.S. at 441; *see also* §565.006, RSMo 1978; *Gregg v. Georgia*, 428 U.S. 153, 191

(1976).

Missouri law provides for no such trial-like procedures in non-capital proceedings.[2] Non-capital sentence enhancement proceedings do not include opening statements, jury instructions, final arguments or deliberations. Thus, *Bullington's* "underlying rationale" has no application to Missouri's non-capital sentencing proceedings.

The Double Jeopardy Clause was designed to protect an innocent defendant from the anxiety and insecurity of having to face repeated attempts by the prosecutor to obtain a conviction. Whatever justifications may exist to extend that protection to trial-like capital sentencing proceedings, they plainly do not warrant extending those protections to

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[2]Although the Court of Appeals indicated that Missouri's Prior and Persistent Offender Statute was "unique", it certainly does not contain the same or similar trial-like provisions relied upon by this Court in *Bullington* in characterizing Missouri's death penalty procedures as unique. Under Missouri law, the information or indictment must plead the basis for finding a defendant to be a prior offender. Evidence is presented outside the presence of the jury, §558.021.2, RSMo 1986, and the trial court must make findings that the defendant is a prior and persistent offender. §558.021.2, RSMo 1986. This finding must occur prior to submitting the cause to the jury. §558.021.2, RSMo 1986. Judicial notice of testimony before the jury may be used to establish a finding that the defendant is a prior and persistent offender, §558.021.2, RSMo 1986. Likewise, a defendant may waive proof of the facts alleged. §558.021.5, RSMo 1986.

ordinary non-capital sentencing proceedings. This is because a prior offender has the status of being a prior offender and this status cannot be changed by a statute requiring the state to prove the defendant's status. Nor can a defendant who has a prior conviction be subject to governmental oppression by the prosecutor's attempts to use the defendant's prior convictions on resentencing. The concerns of prosecutorial misconduct cannot exist since a defendant's prior convictions either do, or do not, exist. Logic requires that once a prior offender, always a prior offender absent a show of reversal or pardon of the prior conviction. The defendant does not lose his status as a recidivist by the government's failure to prove this status. A prior conviction cannot be expunged by the failure to comply with the statutory requirements of a prior offender proceeding.

Furthermore, the Double Jeopardy Clause should not be extended to non-capital sentencing proceedings because non-capital sentencing proceedings provide for a broad range of punishment. *Bullington* held that the Double Jeopardy Clause is applicable only when the sentencer is without discretion to exercise its authority and cannot apply a wide range of punishment. *Id.*, 451 U.S. at 444. *Bullington's* rationale is not applicable where, like in non-capital sentencing proceedings, the sentencer can exercise its discretion and select the punishment it believes is appropriate

for the offense and the offender. *Williams v. New York*, 337 U.S. 241 (1949).[3] When the sentencer has a wide range of punishment from which to choose, the Double Jeopardy Clause does not foreclose the issuance of a higher sentence upon resentencing. *North Carolina v. Pearce, supra.*[4]

In *Bullington*, this Court noted that the jury in capital punishment proceedings were "not given unbounded discretion to select an appropriate punishment from a wide range authorized by statute." *Id.* 451 U.S. at 438. Before, and after *Bullington* this Court has declined to extend the Double Jeopardy Clause to sentencing proceedings which authorize a wide range of punishment. In *North Carolina v. Pearce, supra*, this Court found that the imposition of a higher sentence by the trial court after a defendant was successful in having his conviction reversed on appeal did not bar the imposition of a higher sentence after retrial. This holding was extended to jury sentencing in *Chaffin v.*

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[3]The purpose of punishment is to assure that the punishment fits the offender and not merely the crime. *Williams v. New York, supra*, 377 U.S. at 248. The rehabilitation of a defendant is a factor the sentencer may consider. *Id.*

[4]Although a defendant cannot receive a higher sentence on resentencing due to vindictiveness by the sentencer, that is not because the Double Jeopardy Clause forbids the higher sentence but rather because the Fourteenth Amendment prohibits such misconduct. *North Carolina v. Pearce, supra* 395 U.S. at 725.

Stynchcombe, 412 U.S. 17 (1973). Likewise, this Court declined to extend the Double Jeopardy Clause to federal enhancement proceedings. *United States v. DiFrancesco*, 449 U.S. 117 (1980). In *DiFrancesco*, the prosecution appealed the imposition of sentence by the trial court. This Court held that given the broad range of punishment the court could impose, the Double Jeopardy Clause did attach. *Bullington v. Missouri, supra*, 451 U.S. at 440.

When a defendant voluntarily appeals his conviction, the Double Jeopardy Clause should not apply to sentencing issues. The defendant's actions removes the finality of his conviction and the attachment of jeopardy. Because the government did not choose to put the defendant twice "in jeopardy" when a defendant appeals his conviction, the rationale of the Double Jeopardy Clause does not apply.

Unlike the jury in *Bullington*, the judge in the present case could have sentenced respondent to a broad range of punishment.[5] The judge was not limited to imposing either

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[5]Respondent was convicted on three (3) counts of the Class A felony of first degree robbery (*§569.020, RSMo 1986*) and sentenced under §558.011, RSMo 1986, to fifteen years imprisonment on each count. The range of punishment for a Class A felony is a term of imprisonment not less than ten years and not greater than thirty years, or a term of life imprisonment. As a persistent offender, the judge could sentence respondent only within the range of a Class A felony. *§558.016.6, RSMo 1986.*

life imprisonment or capital punishment. *Bullington v. Missouri, supra* 451 U.S. at 438. Because the judge could have sentenced respondent within a range of punishment of ten to thirty years or to life imprisonment, the reasoning of *Bullington* is inapplicable to non-capital sentence enhancement proceedings. The lack of sentencing discretion, a rationale for the Court's application of the Double Jeopardy Clause to capital sentencing proceedings, is not present in this non-capital case.

The rationale that the Double Jeopardy Clause should apply to capital sentencing proceedings because "death is different" obviously does not exist in non-capital sentencing proceedings. Capital cases receive different review than non-capital cases. *Barefoot v. Estelle*, 463 U.S. 880, 913 (1983) (Marshall, J., dissenting) ("Time and again the Court has condemned procedures in capital cases that might be completely acceptable in an ordinary case. *See, e.g. Bullington v. Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981)"). This Court acknowledged that the anxiety and insecurity faced by a defendant during a capital sentencing proceeding was "equivalent to that faced by any defendant at the guilt phase of a criminal trial." *Bullington v. Missouri, supra* 451 U.S. at 445. By contrast, although a defendant in non-capital sentencing proceedings may feel the insecurity of not knowing the length of his sentence, such

insecurity has never been found to violate the federal Constitution. *United States v. DiFrancesco, supra,* 449 U.S. at 136.

Once found guilty, the anxiety of sentencing is *de minimis*. The government oppression and the opportunity to convince a sentencer to impose the death penalty upon retrial does not exist in a non-capital sentencing proceeding. The defendant's interest of finality in a sentence is outweighed by societies' interest in assuring that the punishment fits the offender, which in this case is a convicted recidivist. *Williams v. New York, supra,* 337 U.S. at 248.

Sentencing is a discretionary function which allows the sentencer to impose a range of punishment, within the limits authorized by the legislature, to fit the offense for which the defendant stands convicted. To contend that a non-capital sentence proceeding subjects a defendant to the same anxiety as a defendant in a capital sentencing proceeding is illogical given the different natures of the punishment.

Even if this Court were to determine that the Double Jeopardy Clause extends to non-capital sentence enhancement proceedings, the extension should be barred in this case under *Teague v. Lane*, 489 U.S. 288 (1989). Because this case comes before the Court on collateral review, 28 U.S.C. §2254, retroactivity is an issue that must be addressed before

habeas relief can be granted to respondent. *Graham v. Collins*, 113 S.Ct. 892, 897 (1993). The grant of habeas relief to respondent would require the development of "new law". This Court has never extended *Bullington* to non-capital sentence enhancement proceedings. To the contrary, the issue was not addressed in *Bullington*, and was expressly reserved in *Lockhart v. Nelson*, 488 U.S. 33, 37 n.6 (1988).

In denying respondent's double jeopardy claim, the Missouri Court of Appeals relied on *State v. Holt*, 660 S.W.2d 735 (Mo.Ct.App. 1983) and *State v. Lee*, 660 S.W.2d 394 (Mo.Ct. App. 1983) (per curiam). The Federal Court of Appeals held that the Missouri state court's determination that the Double Jeopardy Clause does not apply to non-capital sentencing proceedings was "mistaken" and irrelevant. However, the Missouri court made "'a reasonable, good-faith interpretation of existing precedent.'" *Lockhart v. Fretwell,* 113 S.Ct. 838, 844 (1993), *quoting Butler v. McKellar*, 494 U.S. 407, 414 (1990). *Teague* protects state court judgments based on reasonable, good-faith interpretation of federal law, even though those interpretations later prove incorrect. Since the Missouri state court's opinion made a reasonable, good-faith interpretation of existing precedent, the fact that it was "mistaken" does not matter.

The Federal Court of Appeals' holding that "[e]xtending *Bullington* to non-capital sentence enhancement

hearings is not a sufficient stretch to cause it to be a new rule under *Teague*" is erroneous. The mere fact that the Court of Appeals "stretch[ed]" *Bullington* is itself sufficient to show it created a new rule. The protection afforded to the hundreds of capital prisoners on death row, is now extended to the hundreds of thousands of prisoners confined for non-capital offenses. Of course, the lower court's "stretch" analysis is improper *Teague* analysis. Rather, the Court of Appeals should have examined the legal landscape from this Court to determine if respondent was requesting the Court of Appeals to create new law. *See Gilmore v. Taylor*, 113 S.Ct. 2112, 2116-2118 (1993); *Graham v. Collins*, *supra*, 113 S.Ct. at 898. The survey of *Bullington* and *Lockhart v. Nelson* shows respondent requests the application of "new law."

II.

This Court's decision in *Bullington v. Missouri*, 451 U.S. 430 (1981) extends the protection afforded by the Double Jeopardy Clause contrary to the original intent of the clause as articulated by the terms of the Constitution and beyond the traditional protection of the clause.

Bullington's extension of the Double Jeopardy Clause to capital sentencing proceedings should be reconsidered and overruled because it is contrary to the plain language and constitutional history of the clause, all previous precedents of this Court, and common sense.[6]

Nothing indicates that the framers of the Constitution intended the Double Jeopardy Clause to apply to sentencing, either capital or non-capital. On June 8, 1789, James Madison proposed an amendment to the Constitution in the House of Representatives which held that "No person shall be subject, except in case of impeachment, to more than one punishment or trial for the same offense." J. Sigler, Double

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[6]This Court held in *United States v. Dixon*, 61 U.S.L.W. 483[illegible] (U.S. June 28, 1993), that *stare decisis* need not be followed "when governing decisions are unworkable or are badly reasoned." *Id.*, 61 U.S.L.W. at 4841.

Jeopardy, the Development of a Legal and Social Policy, Cornell University Press, N.Y. (1969), p. 28. However, the Senate version differed in that it substituted "be twice put in jeopardy of life or limb by any public prosecution" for the latter half of the House amendment. *Ibid. p. 31.* The "twice put in jeopardy of life or limb" language of the Senate version ultimately prevailed, and is contained in the Fifth Amendment. "In all probability, the drafters of the Clause intended to alter Madison's proposal only with a view to its clarification", that being a single trial for a single offense. *Ibid.* Extension of the Double Jeopardy Clause to sentencing is inconsistent with the "single trial for a single offense" meaning intended by the drafters.

The Double Jeopardy Clause has been consistently interpreted to prohibit only prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). Absolute finality has not been afforded in cases where the trial does not end in acquittal. *United States v. DiFrancesco*, 449 U.S. 117, 130 (1980). For instance, when a defendant invokes his statutory right to appeal, the Double Jeopardy Clause does not prohibit a defendant from being retried if he is successful in having his conviction overturned. *United States v. Scott*, 437 U.S. 82, 91 (1978).

Until *Bullington*, this Court had never applied the Double Jeopardy Clause to sentencing decisions after retrial. Although the *Bullington* court may have been inclined to do so because "death is different," that rationale is grounded in the Eighth Amendment principles concerning cruel and unusual punishments, not the Double Jeopardy Clause. This Court's holding in *Bullington* applying the Double Jeopardy Clause to sentencing proceedings is inconsistent with the holdings in *North Carolina v. Pearce, supra,* and *United States v. DiFrancesco, supra.* Although the Court distinguished these cases because of the "unique" procedures employed during Missouri capital sentencing proceedings, the analytical "difference is immaterial for the purpose of the Double Jeopardy Clause." *Bullington v. Missouri, supra,* 451 U.S. at 448, n.2 (Powell, J. dissenting).

Simply because the first jury declined to impose the death penalty does not establish that the state failed to prove its case. Such analysis could be equally applicable to non-capital cases after retrial which included opening statements, evidence, jury instructions and deliberations, and which the jury imposed a harsher sentence than the first jury, a situation which has been consistently allowed by this Court. *Stroud v. United States,* 251 U.S. 15 (1919).

Application of the Double Jeopardy Clause should not depend on the procedural niceties established by each state.

A state could establish a capital or non-capital sentencing scheme that has a full range of sentences, not just the life imprisonment or death option in *Bullington*. A state need not provide for jury sentencing. *Clemons v. Mississippi*, 494 U.S. 738 (1990). A state could also not afford a bifurcated proceeding which distinguished *Bullington* from *Stroud*. The constitutional minimum required by this Court, *Graham v. Collins*, 113 S.Ct. 892, 915-17 (1993) (Stevens, J. dissenting), could be utilized by a state without invoking the procedures rationale of *Bullington*. The phrase "death is different" does not explain the procedures rationale in *Bullington*.

As Justice Powell points out in his dissent in *Bullington*, "[u]nderlying the question of guilt or innocence is an objective truth," 451 U.S. at 450. The sentencing function is not to establish the facts underlying the conviction, but rather to determine the punishment the jury sees fit. This punishment is subjective and lies within the discretion of the sentencer. As long as the punishment imposed is within the allowable statutory range, the sentence cannot be determined erroneous.

The policy concerns of the Double Jeopardy Clause are not present in a sentencing proceeding. Sentencing is part of the original proceeding. The purpose of sentencing is to impose punishment that fits the offender. *Williams v.*

New York, 337 U.S. 241, 248 (1949) While the trial focuses on the defendant's conduct, the sentencing focuses on the defendant's status; *e.g.*, his age, his mental ability, his background and the like. The status of a defendant is only relevant upon the jury's finding that the defendant's conduct violated the law. A determination of status cannot be had without the finding that the defendant's conduct violated the law. The sentencing is therefore a continuation of the original proceeding and not a separate proceeding subject to the protection of the Double Jeopardy Clause. Societal interest in assessing punishment that fits the offender outweighs the defendant's right to finality of a sentence.

Likewise, the purpose of a prior and persistent status is not to enhance punishment on an arbitrary basis, but rather to achieve society's goals of punishment that ensures an accurate sentence for defendants who repeatedly violate the laws. Societal goals of punishing repeat offenders far outweigh a defendant's rights in sentencing. *See Furman v. Georgia*, 408 U.S. 238, 308 (1972) (Stewart, J., concurring)

For instance, under Missouri's capital sentencing scheme a jury need not impose a sentence of death even if they find that the prosecutor proved the statutory aggravating circumstances making a defendant eligible for the death penalty. *State v. Petary*, 790 S.W.2d 243, 246 (Mo. 1990), *cert. denied*, 498 U.S. 973 (1990). The Missouri Approved

Instructions allows the jury to impose life imprisonment even when the prosecutor has presented sufficient aggravating circumstances:

> Even if you decide that a sufficient mitigating circumstance or circumstances do not exist which outweigh the aggravating circumstance or circumstances found to exist, you are not compelled to fix death as the punishment. Whether that is to be your final decision rests with you (MAI-CR2d 15.46).

Bullington's holding that a jury's recommendation of life imprisonment is an implied acquittal of the death penalty overlooks the jury's discretion in sentencing in capital cases. An acquittal of a higher offense implies that the jury did not find sufficient evidence of the higher offense. *Green v. United States*, 355 U.S. 184 (1957). However, in a capital case, the jury may sentence a defendant to life imprisonment even though the state has proved, beyond a reasonable doubt, the statutory aggravating circumstances. *Bolder v. Armontrout*, 921 F.2d 1359, 1367 (8th Cir. 1990), *cert. denied*, 112 S.Ct. 154 (1991). The jury's sentence of life imprisonment does not imply that the evidence is insufficient.

The question is not whether the sentencing proceeding resembles a trial, but rather "whether the reasons for considering an acquittal on guilt or innocence as absolutely final apply equally to a sentencing decision imposing less

than the most severe sentence allowed by law." *Bullington v. Missouri, supra* 451 U.S. at 450 (Powell, J. dissenting). The past precedent of this Court has clearly held that the Double Jeopardy Clause does not attach to sentencing decisions even if defendant receives a greater sentence on retrial. In fact, this Court itself said that there are "fundamental distinctions between a sentence and an acquittal, and to fail to recognize them is to ignore the particular significance of an acquittal." *United States v. DiFrancesco, supra*, 449 U.S. at 133. "Thus, it may be said with certainty that history demonstrates that the common law never ascribed such finality of a sentence" as it does to guilt or innocence. *Id.* 449 U.S. at 134. There is no expectation of finality of a sentence until an appeal is concluded or the time for an appeal has expired. *Id.* 449 U.S. at 136. In *Bullington*, this Court itself noted that:

> This Court, however, has resisted attempts to extend that principle [Double Jeopardy] to sentencing. The imposition of a particular sentence usually is not regarded as an "acquittal" of any more severe sentence that could have been imposed. *Id.* 451 U.S. at 438.

Although *Bullington* extended the Double Jeopardy Clause to capital sentencing proceedings, the Court has not been inclined to extend it any further. *Poland v. Arizona*, 476

U.S. 147, 155-156 (1986) (Court declined to "extend *Bullington* further").

"The Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner." *Bozza v. United States*, 330 U.S. 160, 166-167 (1947). The degree of finality given to the guilt phase of a trial is significantly different from that given to sentencing. The Double Jeopardy Clause applies to guilt or innocence because it prevents the possibility of a defendant being tried after acquittal. "A retrial of a defendant once found to have been innocent 'enhance[es] the possibility that even though innocent he may be found guilty.'" *Bullington v. Missouri*, 451 U.S. at 451 (Powell, J. dissenting), *quoting Green v. United States*, 355 U.S. 184, 188 (1957). The concern and anxiety relate to the determination of guilt or innocence and not to a defendant's status. *United States v. DiFrancesco, supra*, 449 U.S. at 136. Once a defendant is found guilty, "[t]he defendant is subject to no risk of being harassed and then convicted, although innocent." *Id.*

The concern that an innocent defendant may be convicted does not apply to sentencing which is purely discretionary because the purpose of sentencing is to assess a punishment that fits the offender. *North Carolina v. Pearce, supra*, 395 U.S. at 723. At the sentencing stage, the

defendant has already been found to be guilty, *Herrera v. Collins*, 113 S.Ct. 853, 860 (1993) (once convicted "presumption of innocence disappears"). The concerns of the death penalty are protected under the Eighth Amendment that are guaranteed by State and Federal Courts. *See Herrera v. Collins, supra*, 113 S.Ct. at 863 (punishment, not guilt, is "properly examined within the purview of the Eighth Amendment"). Further, the states generally provide additional protections under state procedural laws, guaranteed by the State Courts, beyond the constitutional minimum. These include mandatory review of death penalties. In these circumstances, the concerns of the Clause are not necessary.

The possibility of a higher sentence after retrial has been previously accepted by this Court as "a legitimate concomitant of the retrial process." *Chaffin v. Stynchcombe*, 412 U.S. 17, 25 (1973). Absent vindictiveness, a higher sentence at retrial is permissible. *Id.* The first prerequisite for an improper retaliatory penalty is knowledge of the prior sentence. *Id.* 412 U.S. at 26. Distinctions between jury and judicial sentencing diminish the possibilities of impropriety when a jury presents a defendant with a higher sentence after retrial. *Id.* 412 U.S. at 27. The jury will have no personal stake to engage in self-vindictiveness that a judge or prosecutor may have. *Id.* Thus, a jury who gives a defendant a higher sentence after retrial poses no real threat

of vindictiveness. *Id.* 412 U.S. at 28. Likewise, the incidental deterrent effect of the possibility of a greater sentence after retrial does not violate any constitutional right of a defendant absent a showing of vindictiveness. *Id.* 412 U.S. at 29-30. As this Court held in *Chaffin v. Stynchcombe, supra,* "we doubt the 'chill factor' [of a higher sentence on retrial] will often be a deterrent of any significance." *Id.* 412 U.S. at 33.

The Court's departure from the standard that sentencing is not afforded the finality given the guilt or innocence phase of a trial should be corrected by overruling the decision in *Bullington*. The holding in *Bullington* is not such a well-established precedent that this Court should be concerned by the overruling of *Bullington*. *See United States v. Dixon*, 61 U.S.L.W. 4835 (U.S. June 28, 1993). This Court's unwillingness to extend *Bullington* by distinguishing it from other cases establishes that *Bullington* is contrary to past precedents.

CONCLUSION

Petitioners pray that this Court reverse the United States Eighth Circuit Court of Appeals' holding extending the application of *Bullington* to non-capital sentencing proceedings. Furthermore, petitioners request that this Court overrule its decision in *Bullington* and hold that the Double Jeopardy Clause does not apply to capital or non-capital sentencing proceedings.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Missouri Attorney General

FRANK A. JUNG
Assistant Attorney General
Counsel of Record

P. O. Box 899
Jefferson City, MO 65102
(314) 751-3321

Attorneys for Petitioners

No. 92-1500

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

PAUL CASPARI, Superintendent of the Missouri Eastern Correctional Center, and JEREMIAH W. (JAY) NIXON, Attorney General of Missouri,
Petitioners,

v.

CHRISTOPHER BOHLEN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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RESPONDENT'S BRIEF ON THE MERITS

RICHARD H. SINDEL
(Counsel of Record)
SINDEL & SINDEL, P.C.
8008 Carondelet, Suite 301
St. Louis, Missouri 63105
(314) 721-6040
Counsel for Respondent

45pp

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RESPONDENT'S BRIEF ON THE MERITS

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Double Jeopardy Clause of the Fifth Amendment provides: "No person shall * * * be subject for the same offense to be twice put in jeopardy of life or limb."

2. The Eighth Amendment provides: "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

3. The relevant portions of Mo. Rev. Stat. §§ 565.001, 565.006, 565.012, and 557.036 (1978) are reproduced in the Appendix, *infra,* 1a-6a.

STATEMENT OF THE CASE

Respondent adopts, with the following important exceptions, Petitioner's Statement of the Case.

Petitioner mischaracterizes the basis for the state appellate court's initial remand on direct appeal. *See State v. Bohlen*, 670 S.W.2d 119 (Mo. App. 1984) (A-63). The case was remanded *not* because the trial court failed to perform some ministerial act, e.g., "made no findings of fact," (Brief for Petitioner, hereinafter Pet. Br. 7) but because there was "no proof made of the prior convictions." *State v. Bohlen*, 670 S.W.2d at 123. (A-73).

Petitioner also misstates the basis for the reversal by the United States Court of Appeals for the Eighth Circuit. That Court did *not* hold "that respondent's double jeopardy rights had been violated by the Missouri Court of Appeals' remand of the case to the circuit court for a *determination* of respondent's prior and persistent offender status." (Pet. Br. 8) (emphasis added). Rather, the Court of Appeals recognized that, when there has been a "total failure of proof," the state has '"received 'one fair opportunity to offer whatever proof it could assemble,' . . . [and] "is not entitled to another."' *Bohlen v. Caspari*, 979 F.2d 109, 115 (1993).

SUMMARY OF THE ARGUMENT

POINT I

From its earliest days, the concept of double jeopardy or *autrefois acquit* has protected an accused, who has been convicted from being retried. This protection preserves the finality of judgments, the defendant's interest in repose, and the unqualified right of the factfinder to determine the strengths and failings of the State's case beyond a reasonable doubt. The State now seeks to nullify those findings because, through neglect, it failed to present evidence to support the distinct issue of Bohlen's

recidivist status at his trial. The trial court, pursuant to controlling statutes, was required to find and determine at a proceeding that had all the "hallmarks of a trial," Respondent's status and eligibility for sentence enhancement. The State's failure to muster the evidence sufficient to establish the required facts and the state appellate court's determination of evidentiary insufficiency must be afforded the same constitutional protection as has always been granted verdicts of acquittal, whether expressed or implied. *Green v. United States*, 355 U.S. 184, 187-188 (1957).

The State had been granted its one full and fair opportunity to prove Bohlen's status as a persistent offender. Failure to produce the evidence to justify such a finding precludes them from a second attempt.

POINT II

Because the decision in *Bohlen v. Caspari*, was dictated by the holdings in *Burks v. United States*, 437 U.S. 1 (1978), and *Bullington v. Missouri*, 451 U.S. 430 (1981), it did not announce a new rule and Respondent is entitled to benefit from the prevailing law at the time his conviction became final. The state appellate court failed in any meaningful way to distinguish its holding from the decision in *Bullington*, relying instead on rulings from the state supreme court that preceded this Court's holding in *Bullington*. Furthermore, *Bohlen* falls within the two exceptions enunciated in *Teague*. The proper application of the Double Jeopardy Clause to Bohlen's situation precludes a second sentencing trial and deprives the State of the opportunity to punish him as recidivist. The failure to present evidence at the first trial, the main event, forever renders him ineligible for sentencing enhancement in this case. Secondly, the Double Jeopardy Clause is a bedrock procedural protection implicit in the concept of ordered liberty whose protections have been recognized as necessary to secure accurate and fair factual determinations of guilt.

POINT III

Petitioner and Amici have failed to demonstrate any compelling need or justification that would warrant the exceptional action of overruling the Court's decision in *Bullington*. Petitioner has not proved the application of the holding in *Bullington* unstable or confusing. Countless capital defendants presently rely on its holding to insulate them from repeated attempts on their lives if they happen to succeed in obtaining reversals of their convictions. In addition, *Bullington* acts as an appropriate restraint on prosecutorial overreaching at the initial trial. *Bullington* remains a viable, well-reasoned and altogether appropriate application of the principles of the Double Jeopardy Clause.

Finally, this case, because it does not have life or death implications, is not the appropriate vehicle for this Court to reexamine the holding in *Bullington*.

ARGUMENT

I. THE DOUBLE JEOPARDY CLAUSE DENIES THE PROSECUTION A SECOND SENTENCING ENHANCEMENT HEARING IF THERE WAS A FAILURE OF PROOF AT THE FIRST SENTENCING ENHANCEMENT HEARING

The statutes of the State of Missouri "*explicitly require*[ ] the [factfinder] to determine whether the prosecution has proved" at a trial-like proceeding that a capital defendant has met the legislative criteria for death.[1] *Bullington v. Missouri*, 451 U.S. 430, 444 (1981) (emphasis in original). At Bullington's sentencing trial, the jury assessed his punishment at life. When Bullington was granted a new trial the State announced its intention to seek the death penalty a second time. The Court ruled

[1] At the time *Bullington* was tried Mo. Rev. Stat. §§ 565.006, 565.008 and 565.012 controlled the bifurcated trial proceeding. (Appendix). There have been no substantial changes or modifications of these procedures since 1977.

that the jury determination of a life sentence in a proceeding that closely resembled a trial foreclosed the State from attempting a second time to procure a sentence of death. The Court concluded that Bullington's acquittal of the State's case for death was entitled to the protections of the Double Jeopardy Clause because the sentencing proceeding[2] had the "hallmarks of the trial on guilt or innocence," such as the opportunity for counsel to make opening statements, the presentation of testimony and evidence, jury instructions (if the case is tried by a jury[3]), the opportunity for counsel to argue their respective positions, and deliberations. *Id.* at 438-439 n.10. "The presentence hearing resembled and, indeed, in all relevant respects was like the immediately preceding trial on the issue of guilt or innocence." *Bullington*, 451 U.S. at 438.

The Court distinguished *Bullington*'s situation from its previous holding in *Stroud v. United States*, 251 U.S. 15 (1919), because of the significant differences in the trial-like aspects at Bullington's sentencing from the unitary proceedings utilized in *Stroud*, and the statutory requirements that limited the fact-finder's discretion by requiring that certain elements be proved beyond a reasonable doubt; "[i]n *Stroud*, no standards had been enacted to guide the jury's discretion." *Bullington*, 451 U.S. at 439, 446. The statutory scenario for determining Bohlen's status as a repeat offender is no different.

A comparison of the sentencing enhancement statutes with the capital sentencing statutes illustrates their parallel

[2] Application of the Clause is not so much the nature of the proceeding as it is the legal consequences that flow from it. For example, the Court has held that the protection of the Double Jeopardy Clause attaches to nonsummary criminal contempt prosecutions just as it does in criminal prosecutions. *United States v. Dixon*, 113 S.Ct. 2849 (1993).

[3] In Missouri the sentencing trial and the guilt/innocence trial can be by judge or jury. See Mo. Rev. Stat. § 565.006.1 (1977).

applications.[4] In Missouri, to enhance a defendant's sentence: (i) the State must give notice of its intent to so proceed by the filing of an indictment or information that "pleads all essential facts warranting a finding that the defendant is a prior offender, persistent offender, or dangerous offender," Mo. Rev. Stat. § 558.021.1.(1) *compare* Mo. Rev. Stat. § 565.006.2 ("Only such evidence in aggravation as the prosecution has made known to the defendant prior to his trial shall be admissible."); (ii) the State must prove that the defendant has been convicted of at least one felony beyond a reasonable doubt, § 558.021.1.(2), *compare* § 565.012.4 (the prosecutor must prove the elements of his case and the defendant's status as one worthy of the death penalty beyond a reasonable doubt); and (iii) the factfinder, after deliberation, must make findings of fact that enhanced offender status is warranted, § 558.021.1.(3), *compare* § 565.012.4. ("The jury, if its verdict is a recommendation of death, shall designate in writing . . . the aggravating circumstance or circumstances which it found beyond a reasonable doubt."). The features of the enhancement trial are virtually identical to the proceedings the Court held were sufficiently "unique" to require departure from its previous holdings[5] and apply the protections of the Double Jeopardy Clause when the State fails to prove its case. *Bullington*, 451 U.S. at 441-442 n.15.

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[4] All statutory references hereafter are to the enhancement statutes in effect at the time of Bohlen's trial (Mo. Rev. Stat. § 558.021 (Supp. 1981)) and to the capital sentencing statutes in effect at the time Bullington was tried (Mo. Rev. Stat. §§ 565.006, 565.008, and 565.012 (1977)).

[5] Prior to *Bullington*, the Court declined to hold that a life sentence imposed at a defendant's first capital trial barred the imposition of the death sentence at a retrial following appellate reversal of his first conviction (*Stroud v. United States*, 251 U.S. 15 (1919)). More recently the Court has held that the Double Jeopardy Clause generally does not forbid the imposition of a longer prison sentence following retrial. *North Carolina v. Pearce*, 395 U.S. 711, 719-721 (1969); *Chaffin v. Stynchcombe*, 412 U.S. 17, 24 (1973).

"In *Pearce*, *Chaffin*, and *Stroud*, there was no separate sentencing proceeding at which the prosecution was required to prove—beyond a reasonable doubt or otherwise—additional facts in order to justify a particular sentence. In each of these cases, moreover, the sentencer's discretion was essentially unfettered." *Bullington*, 451 U.S. at 439. In this case, as in *Bullington*, the factfinder's determination of defendant's status as a previous offender was not unfettered and a factual predicate must be estabilshed and decided utilizing procedures that afford him all the fundamental constitutional rights guarteed him at his trial on guilt or innocence.[6]

Whether Bohlen meets the statutory criteria to accord him the status of a persistent offender is an inherently and fundamentally different decision from a sentencing determination of a term of years of incarceration. The first is the choice between two alternatives—guilty or not guilty of being a persistent offender—while the latter is a line-drawing decision on a continuous spectrum containing numerous possibilities. *Bullington*, 451 U.S. at 440-441. The sentencing in *Pearce* and *Chaffin* involved a decision as to where to draw a somewhat arbitrary line from a large number of alternatives. Deciding Bullington's and Bohlen's status, however, is the stark either/or, yes/no, proved/not proved, guilt/acquittal, finding of objective fact that the factfinder is charged with making in all criminal cases. That Bohlen's status must be proved beyond a reasonable doubt substantiates his claim for finality because "the interests of the defendant are of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment . . . . [O]ur society imposes almost the entire risk of error upon itself." *Bullington*, 451 U.S. at 441 (*quoting Addington v. Texas*, 441 U.S. 418, 423-424 (1979)).

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[6] "The defendant shall be accorded full rights of confrontation and cross-examination, with the opportunity to present evidence, at [the sentencing] hearings." Mo. Rev. Stat. § 558.021.4 (1981).

A trial judge is not charged with selecting a sentence of a term of years beyond a reasonable doubt. There is no legal burden on the State to prove, nor upon the sentencer to arrive at, the correct punishment. When faced with a wide range of punishment possibilities across a broad spectrum of available alternatives, this Court has not applied the strictures of the Double Jeopardy Clause. Bohlen's complaint does not emanate from a determination of how long a prison sentence is appropriate for him and the crime he was convicted of committing (as was the situation in *Williams v. New York,* 337 U.S. 241, 248 (1949)), but rather from the determination of his status as a persistent offender absent *any*[7] evidence[8] to support such a finding.

It is this yes/no fact-driven determination of status that is the common thread that links *Bullington* with its progeny and distinguishes it from those cases in which the Court has found its holding inapplicable. In *United States v. DiFrancesco,* 449 U.S. 117 (1980), the Court upheld the government's statutory right to appeal a sentence imposed upon a federal defendant found by the District Court to be a "dangerous special offender."[9] At Di-

[7] "We emphasize that . . . this is not a case of trial error, but a total failure of proof." *Bohlen v. Caspari,* 979 F.2d 109, 115 (8th Cir. 1992) (A-22).

[8] The State cannot contend, as it did in its argument below, that the transcript simply fails to reveal what had occurred or that this Court should presume that such a proceeding took place. No "presumption of regularity" attached to the proceedings in the sentencing court nor did the Petitioner seek to prove at an evidentiary hearing, by affidavit or otherwise, that there was a hearing of any sort during Bohlen's trial. "This is . . . a case in which an extant transcript is suspiciously 'silent' on the [relevant] question. . . ." *Parke v. Raley,* 506 U.S. ——, 113 S. Ct. 517, 523-524 (1992). Although the Missouri Court of Appeals "requested the parties to supplement the record to *prove* that the prior convictions were presented to the court[,] [n]o such proof was furnished." *State v. Bohlen,* 670 S.W.2d 119, 123 (Mo. App. 1984) (emphasis added), (A-73); *Bohlen v. Caspari,* 979 F.2d at 115 n.7 (A-23).

[9] 18 U.S.C. § 3575(e) and (f) and 18 U.S.C. § 3576.

Francesco's sentencing hearing the Government introduced evidence, in addition to that adduced at trial, to prove DiFrancesco's previous convictions and his status as a "dangerous special offender." *DiFrancesco,* 449 U.S. at 124. The District Court made specific findings of fact that the Government had proved that defendant was a dangerous special offender but only sentenced defendant to "additional imprisonment . . . [of] one year." *Id.* at 124-125. The government appealed the sentence, *not* the status determination.

DiFrancesco is easily distinguished from the case at bar. First, and primarily, DiFrancesco had properly been found "guilty" of being a dangerous special offender by the trial court; his status as such had been determined after receipt of appropriate evidence. As the Court in *Bullington* pointed out, the record in *DiFrancesco* included the evidence and finding of the sentencing court; it might have been different if the Government had sought "a *de novo* proceeding that gives the Government the opportunity to convince a second factfinder of its view of the facts." *Bullington,* 451 U.S. at 440. The Court in *DiFrancesco* said as much: "[T]he Double Jeopardy Clause prohibits retrial after a conviction has been reversed because of insufficiency of the evidence[;] * * * It is acquittal that prevents retrial. . . ." *DiFrancesco,* 449 U.S. at 131, 132.

Likewise, in *Poland v. Arizona,* 476 U.S. 147, 148, 157 (1986), the Court ruled that the Double Jeopardy Clause did not bar further capital sentencing proceedings at retrial when the sentencing judge and the reviewing court had *not* found the evidence insufficient to support imposition of the death penalty. In support of this holding the Court stated that "the proper inquiry is whether the sentencer or reviewing court has 'decided that the prosecution has not proved its case' . . . ." *Id.* at 155 (*quoting Bullington,* 451 U.S. at 444).

It is this factor by itself which distinguishes *Poland* from *Bohlen*: *Poland's* status as "death-eligible" had been determined against him. In one sense, he had been found guilty because the trial judge had determined that death was the appropriate penalty. In the instant case, however, as in *Bullington*, " 'an acquittal on the merits by the sole decisionmaker in the proceeding is final and bars retrial on the same charge.' " *Poland v. Arizona*, 476 U.S. at 153 (*quoting Arizona v. Rumsey*, 467 U.S. 203, 211 (1984)). The "relevant inquiry . . . is whether the sentencing judge or the reviewing court has 'decid[ed] that the prosecution has not proved its case' . . . and hence has acquitted petitioners." *Poland v. Arizona*, 476 U.S. at 154 (*quoting Bullington*, 451 U.S. at 443).

The Court has thus been consitsent in this regard: In neither *DiFrancesco* nor *Poland* was the prosecution allowed a second opportunity "to supply evidence which it failed to muster in the first proceeding," *Burks v. United States*, 437 U.S. 1, 11 (1978), "for it ha[d] been given one fair opportunity to offer whatever proof it could assemble." *Id.* at 16.

Bohlen does not complain that his sentence, i.e., a term of years of imprisonment, is a violation of the Double Jeopardy Clause but, rather, that the State was allowed a second chance to muster the evidence it failed to produe at his first trial. There is nothing *implied* in Respondent's acquittal; the state appellate court expressly determined that there was "no evidence" to justify any such determination. Bohlen had not been proved eligible for application of the sentencing enhancement statutes and the attempt to establish his status at a second trial was unconstituional.

Petitioner argues that defendant's status as a prior offender rather than the government's failure to prove his status should control. (Pet. Br. 15). In other words, Petitioner contends that if a defendant is actually guilty of a crime but the prosecution fails to prove it, the Double

Jeopardy Clause should have no application and the State should "with all its resources and power . . . be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity." *Green v. United States*, 355 U.S. 184, 187-188 (1957); *see also Bullington v. Missouri*, 451 U.S. at 445; *Abney v. United States*, 431 U.S. 651, 661 (1977); *Breed v. Jones*, 421 U.S. 519, 529-530 (1975); *Serfass v. United States*, 420 U.S. 377, 388 (1975); *United States v. Jorn*, 400 U.S. 470, 479 (1971); *United States ex rel. Hetenyi v. Wilkins*, 348 F.2d 844, 858 (2d Cir. 1965) (Marshall, J.) *cert. denied*, 383 U.S. 913 (1966).

It is this threat of repeated prosecutions that the Clause protects against. As now Chief Justice Rehnquist noted in *Ohio v. Johnson*, 467 U.S. 493, 497-498 (1984) (citations omitted) (emphasis added):

> As we have explained on numerous occasions, the bar to retrial following acquittal or conviction ensures that the State does not make repeated attempts to convict an individual, thereby exposing him to continued embarrassment, anxiety, and expense while increasing the risk of an erroneous conviction *or an impermissibly enhanced sentence*.

Petitioner's argument is an entreaty for the Court to ignore "the most fundamental rule in the history of double jeopardy jurisprudence" (*United States v. Martin Linen Supply Co.*, 430 U.S. 567, 571 (1977)) which is that the law "attaches particular significance to an acquittal." *United States v. Scott*, 437 U.S. at 91; Westen & Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81 n.3.

As the Court in *Tibbs v. Florida* emphasized:

> [T]he Double Jeopardy Clause attaches special weight to judgments of acquittal. A verdict of not guilty, whether rendered by the jury or directed by

> the trial judge, absolutely shields the defendant from retrial. A reversal based on the insufficiency of the evidence has the same effect because it means that no rational fact-finder could have voted to convict the defendant.

457 U.S. 31, 41 (1982) (footnotes omitted).

> The constitutional protection against double jeopardy unequivocally prohibits a second trial following an acquittal. The public interest in the finality of criminal judgments is so strong that an acquitted defendant may not be retried even though "the acquittal was based upon an egregiously erroneous foundation." [citations omitted] If the innocence of the accused has been confirmed by a final judgment, the Constitution conclusively presumes that a second trial would be unfair.

Arizona v. Washington, 434 U.S. 497, 503 (1978) (*quoting Fong Foo v. United States*, 369 U.S. 141, 143 (1962)); *see also United States v. DiFrancesco*, 449 U.S. at 129.

That Respondent is in actuality a prior or persistent offender, as that term is defined by Missouri statutes, is of no consequence because "where the Double Jeopardy Clause is applicable, its sweep is absolute." *Burks*, 437 U.S. at 12, n.6.

The Court addressed the absolute nature of the Double Jeopardy Clause head-on in *United States v. Scott*, 437 U.S. 82, 106-108 (1978) (citations omitted):

> [W]hile we have acknowledged that permitting review of acquittals would avoid release of guilty defendants who benefited from "error, irrational behavior, or prejudice on the part of the trial judge," [citations omitted] we nevertheless have consistently held that the Double Jeopardy Clause bars any appellate review in such circumstances. The reason is not that the first trial established the defendant's factual innocence, but rather that the second trial

> would present all the untoward consequenecs the Clause was designed to prevent. Government would be allowed to seek to persuade a second trier of fact of the defendant's guilt, to strengthen any weaknesses in its first presentation, and to subject the defendant to the expense and anxiety of a second trial.
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> * * * *
>
> [The decision in] *Jenkins* recognized that an acquittal can never represent a determination that the criminal defendant is innocent in any absolute sense; the bar to a retrial following acquittal does not—and indeed could not—rest on any assumption that the finder of fact has applied the correct legal principles to all the admissible evidence and determined that the defendant was factually innocent of the offense charged. The reason further prosecution is barred following an acquittal, rather, is that the Government has been afforded one complete opportunity to prove a case . . . and, when it has failed for any reason to persuade the court not to enter a final judgment favorable to the accused, the constitutional policies underlying the ban against multiple trials become compelling. Thus *Jenkins* and *Lee* recognized that it mattered not whether the final judgment constituted a formal "acquittal." What is critical is whether the accused obtained, after jeopardy attached, a favorable termination of the charges against him. If he did, no matter how erroneous the ruling, the policies embodied in the Double Jeopardy Clause require the conclusion that "further proceedings . . . devoted to the resolution of factual elements of the offense charged" are barred.

The determination that Respondent is a "persistent offender" is a "distinct issue" that requires proof to establish its elements. There is no valid reason for distinguishing the proof of this issue from the proof of any other issue or element in a criminal case. *Cf. Specht v. Patterson*, 386 U.S. 608, 610 (1967) (citations omitted) ("[A]n habitual criminal issue is a 'distinct issue' on

which a defendant must receive notice and an opportunity to be heard."). The sentencer is charged with determining an objective truth from the facts discovered at the sentencing procedings. If no evidence is introduced to support the facts that must be found, there can be only one result—acquittal. The answer to this objective factual question cannot be solicited time and time again. Underlying the question of defendant's status as a persistent offender is an objective truth: Did the State prove his status beyond a reasonable doubt? *See Bullington,* 451 U.S. at 450 (Powell, J., dissenting).

The remand of Respondent for a second sentencing trial allowed the State that which the Double Jeopardy Clause forbids: a " 'second bite at the apple.' " *Burks v. United States,* 437 U.S. at 17. *See also United States v. DiFrancesco,* 449 U.S. at 140 ("Important in the decision [in *Swisher v. Brady,* 438 U.S. 204 (1978)] was the fact that the system did not provide the prosecution a 'second crack.' ") The prohibition against allowing the prosecution a second opportunity to supply evidence it failed to gather at the initial proceeding is "at the core of the Clause's protections [and] prevents the State from honing its trial strategies and perfecting its evidence through successive attempts. . . ." *Tibbs v. Florida,* 457 U.S. 31, 41 (1982).

Amici feign concern that if the ruling in the court below is upheld it will work to the eventual detriment of defendants in criminal cases because the states will amend their statutes to no longer require proof of prior convictions beyond a reasonable doubt.

Amici's concern is unfounded. First, the evidence necessary for the State to meet its burden is easy to obtain and present. In the vast majority of cases, the prosecutor merely admits into the record certified records of the previous convictions. *e.g. State v. Ouinn,* 594 S.W.2d 599, 602 (Mo. App. 1980), that bear the same name as the defendant. *State v. Fitzpatrick,* 676 S.W.2d 831, 838

(Mo. banc 1984). Considering the ease with which the State can meet its burden, it is unlikely that State legislatures will be inclined to drastically change established procedures or that defendants will be seriously affected if the burden is incrementally reduced.

Second, after *Bullington* applied the Double Jeopardy Clause to trial-like sentencing proceedings, there was no rush by the State legislatures to alter or amend their capital sentencing statutes to avoid or circumvent the Court's holding, precisely because it does not impose a substantial, unfair or inequitable burden on the State to require it to take its best shot the first time around.

No one can claim that the State in this case did not have "one full and fair opportunity" to make its case. "[A]s a general rule, the prosecutor is entitled to one, and only one opportunity to require an accused to stand trial" where the State can "present [its] evidence to an impartial [factfinder]." *Arizona v. Washington,* 434 U.S. at 505. The Double Jeopardy Clause prohibits repeated attempts to prove defendant's status as a prior offender. Despite Amici's contentions, it is just as likely that the legislatures will recognize the wisdom in restricting the State's ability to return to court an infinite number of times in an effort to prove its case.

Amici's "practical" concerns are hollow; their arguments based on prior law are misleading. Amici's suggestion that *Scott,* 437 U.S. at 92, focused on the vindication of the public's interest in seeing that the guilty are punished is misplaced. *Scott* recognized the importance of "balanc[ing] 'the valued right of a defendant to have his trial completed by the particular tribunal summoned to sit in judgment on him,' *Downum v. United States,* 372 U.S. 734, 736 (1963), against the public interest in insuring that justice is meted out to offenders." *Scott,* 437 U.S. at 92. By statute, Bohlen had the right to have the sentencing enhancement trial completed during his

trial for the substantive offense before the case was submitted to the jury.[10]

Amici also argue that any extension of the Double Jeopardy Clause in *Bullington* resulted from the Court's determination that

> [t]he penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.

Rummell v. Estelle, 445 U.S. 263, 272 (1980) (citing *Furman v. Georgia*, 408 U.S. 238, 306 (1972)). The Court's decision in *Bullington* was, however, *not* grounded in the Eighth Amendment: "Because of our conclusion on the Double Jeopardy Clause issue, we have no occasion to address petitioner's claims under the Sixth, Eighth and Fourteenth Amendment."[11] *Bullington* 451 U.S. at 446 n.17. The Court declined to decide the issue in *Bullington*

[10] "In a jury trial, the facts shall be pleaded, established and found prior to the submission to the jury. . . ." Mo. Rev. Stat. § 558.021.2 (1981).

[11] In addition to the double jeopardy claim, certiorari was granted on the following Questions Presented for Review:

II. Would a sentence of death be excessive and disproportionate in this case wherein a jury determined that a sentence of life imprisonment without possibility of probation or parole for a minimum of fifty years was the appropriate punishment.

III. Are the applicable sections of Missouri Revised Statutes Section 565.012, et seq.—which permit a jury to impose a death sentence if: (i) the crime is found to be "outrageously or wantonly vile, horrible or inhuman" or (ii) the defendant is believed to have "a substantial history of serious assaultive criminal convictions" facially vague and overbroad?

IV. Is Petitioner's right to trial by jury unconstitutionally chilled by permitting the State of Missouri to seek the penalty of death at Petitioner's retrial, after the jury at his first trial returned a sentence of life imprisonment only?

within the narrow precepts of the Eighth Amendment and thus restrict its application to capital cases.

In a similar vein, Petitioner and Amici claim to believe that a defendant's concern over the length of his prison sentence is *de minimis*, and that any anxiety one experiences relates solely to the guilt/innocent aspect of his trial. The truth is more likely as stated by Justice Brennan in his dissent in *DiFrancesco*, 449 U.S. 149-150:

> I suggest th[at] most defendants are more concerned with how much time they must spend in prison than with whether their record shows a conviction. * * * Surely, the Court cannot believe then that the sentencing phase is merely incidental and that defendants do not suffer acute anxiety. To the convicted defendant, the sentencing phase is certainly as critical as the guilt-innocence phase. To pretend otherwise as a reason for [allowing the state to retry respondent's status as a persistent offender] is to ignore reality.

The Solicitor General properly notes that defendant's status as a persistent offender did not expose him to additional punishment. This does not end the inquiry. The fact that Bohlen could have received the identical sentence even if he had not been "found" to be a persistent offender is of no consequence. He lost a valuable right to be tried *and* sentenced by a jury. This is a right significant enough to be preserved to him in both Missouri's Constitution and its statutes.[12] Loss of this right to jury sentencing was of such significance that if he had been improperly deprived of this right, his sentence *and* conviction would be reversed and he would have received a

[12] Mo. Const. art. I § 18(a) provides: "That in criminal prosecutions the accused shall have the right to . . . a speedy public trial by an impartial jury of the county." A defendant has the right to have a jury set the outer limits of his sentence unless he waives it, or his status as a prior, previous or dangerous offender is properly pleaded and proved. Mo. Rev. Stat. § 557.036.2 and § 557.036.3.

new trial. *State v. Bohlen*, 670 S.W.2d at 123 (A-74); *see also State v. Harris*, 547 S.W.2d 473, 476 (Mo. banc 1977) and *State v. Hill*, 371 S.W.2d 278 (Mo. 1963).

Moreover, Bohlen had a right to believe that, once the State failed to present any evidence to support a finding of his status as a persistent offender, he had a legitimate expectation of finality and repose because he could not be returned to court to be retried on an issue on which the State defaulted at the first proceeding.[13] The state appellate court's remand improperly denied him the finality and repose the Double Jeopardy Clause protects.

The Respondent's reliance on the integrity of the appellate court's finding of evidentiary insufficiency is "fundamental" [14] because it is "absolute." [15] "The public interest in the finality of criminal judgments is so strong that an acquitted defendant may not be retried even though 'the acquittal was based upon an egregiously erroneous foundation.'" *Swisher v. Brady*, 438 U.S. at 214 (citing *Arizona v. Washington*, 434 U.S. 497, 503-505 (1978)). Since the turn of the century this guarantee of finality has remained unscathed and continues to be "[t]he very foundation upon which the double jeopardy clause is based" (*United States v. Ball*, 163 U.S. 662, 671 (1896)) and is at the very "heart" of the Double Jeopardy Clause. *Jeffers v. United States*, 432 U.S. 137, 150 (1977) (plurality opinion).

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[13] Missouri law limits the State's right to appeal an "order or judgment which results in: (1) quashing an arrest warrant; (2) suppressing evidence; (3) suppressing a confession or admission" Mo. Rev. Stat. § 547.200.1 (1986); or (4) dismissal of an indictment as insufficient. Mo. Rev. Stat. § 547.210 (1986).

[14] *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1978).

[15] *Burks*, 437 U.S. at 16. See also Westen, *The Three Faces of Double Jeopardy*, 78 MICH. L. REV. 1000, 1004 (1980).

The reasons underlying this rule of finality [16] are no less compelling in this case where Respondent seeks to foreclose the State from taking the forbidden "second crack" at his freedom. Bohlen's interest in the finality of his first trial outweighs any interest the State can claim in achieving a "correct" sentence. "[I]n deciding when the double jeopardy bar should apply, we are balancing two weighty interests: the defendant's interest in repose and society's interest in the orderly administration of justice. *See, e.g., United States v. Tateo*, 377 U.S. at 466." *Lockhart v. Nelson*, 488 U.S. 33, 48 (1988) (Marshall, J., dissenting). Bohlen has a valid and compelling interest in being able "to conclude his confrontation with society" once it has begun *United States v. Jorn*, 400 U.S. 470, 486 (1971).

Bohlen had the right to believe that once the State had failed totally to present evidence of his prior convictions to the trial court he would be sentenced by the jury without the possibility of the imposition of an enhanced or

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[16] Authorities have postulated various reasons for the application of such an inflexible rule as is accorded to verdicts of acquittal, e.g.: "[T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense, and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may become guilty." *Green v. United States*, 355 U.S. 184, 187-188 (1957); "Granting the government such broad appeal rights would allow the prosecutor to seek to persuade a second trier of fact of the defendant's guilt after having failed with the first; it would permit him to reexamine the weaknesses in his first presentation in order to strengthen the second; and it would disserve the defendant's legitimate interest in the finality of a verdict of acquittal." *United States v. Wilson*, 420 U.S. 332, 352 (1975); or it would allow "the government with [its] vastly superior resources [to] wear down the defendant so that 'even though innocent he may be found guilty.'" *United States v. Scott*, 437 U.S. at 91. Westen, *The Three Faces of Double Jeopardy, supra*, 1004-1023; Westen & Drubel, *Toward a General Theory of Double Jeopardy, supra*, 122-137.

extended term of imprisonment. His legitimate expectation of finality was thwarted by the incorrectly compelled ruling in the Missouri Court of Appeals because its "reversal . . . translate[d] into further proceedings devoted to the resolution of factual issues" surrounding Bohlen's status as a previous offender. *Smalis v. Pennsylvania*, 476 U.S. 140, 142 (1986). The opinion of the Court of Appeals for the Eighth Circuit restored this right to him and should be affirmed.

II. THE APPLICATION OF THE PRINCIPLES OF *BULLINGTON v. MISSOURI* AND *BURKS v. UNITED STATES* TO A NON-CAPITAL SENTENCING ENHANCEMENT PROCEEDING WAS NOT A NEW RULE UNDER *TEAGUE v. LANE*

Petitioner and Amici suggest that the Court need not reach the merits in this case because the decision below is not retroactive in that it was not dictated by precedent existing at the time Bohlen's direct appeal rights were exhausted. *Teague v. Lane*, 489 U.S. 288 (1989). The *Teague* inquiry is whether the decision by the Federal Court of Appeals is a "new rule" that "breaks new ground," "imposes a new obligation on the States or the Federal Government" or was not "*dictated* by precedent existing at the time the defendant's conviction became final." *Saffle v. Parks*, 494 U.S. 484, 488 (1990). Respondent contends and the court below determined that the decisions in *Burks v. United States*, 437 U.S. 1 (1978), and *Bullington v. Missouri*, 451 U.S. 430 (1981), compel the rule that Bohlen seeks. *See e.g. Saffle v. Parks*, 494 U.S. at 488. It is not necessary to repeat the Court of Appeals' careful and thoughtful analysis of the precedents that guided its determination. Suffice it to say, that the decision to grant Bohlen relief flowed naturally and was the inevitable by-product of this Court's decisions in *Burks* and *Bullington*. It was the trial-like character of the sentencing proceedings that distinguished *Bullington* from the holding in *Stroud*, not the

Eighth Amendment implications. Despite substantial arguments [17] to support an Eighth Amendment approach to the resolution of the issues present in *Bullington*, the Court declined to limit its application to the capital arena.

Petitioner argues that the Missouri Court of Appeals' reliance on the earlier decisions in *State v. Holt*, 660 S.W.2d 735 (Mo. App. 1983), and *State v. Lee*, 660 S.W.2d 394 (Mo. App. 1983) (per curiam) evince a "reasonable, good-faith interpretation of existing precedent." [18] *Lockhart v. Fretwell*, 113 S. Ct. 838, 844 (1993) (*quoting Butler v. McKellar*, 494 U.S. 407, 414 (1990)). However, the Missouri Court of Appeals in *Holt* never discussed or decided the double jeopardy implications of allowing the State a second opportunity to make its case for recidivist sentencing after it failed to do so in the initial trial. The state court simply "remanded for resentencing in accordance with the persistent offender act." *State v. Holt*, 660 S.W.2d at 730. That the state court ignored or overlooked the double jeopardy issue does not establish "a reasonable, good-faith interpretation" of anything.

Likewise, the appellate court in *State v. Lee*, felt "*constrained* to follow the procedure on this issue clearly mandated by the decisions of the Supreme Court of Missouri [in *State v. Harris*, 547 S.W.2d 473 (Mo. banc 1977); *State v. Hawkins*, 418 S.W.2d 921 (Mo. banc 1967); *State v. Tettamble*, 450 S.W.2d 191 (Mo. 1970); *State v. Garrett*, 416 S.W.2d 116 (Mo. 1967); *State v. Deutschmann*, 392 S.W.2d 279 (Mo. 1965)]." *Id.* at

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[17] Ante. at 18 n.11.

[18] On September 8th of this year the Missouri Supreme Court will hear arguments on the application of the Double Jeopardy Clause to enhanced sentencing trials on remand. *State v. Cobb, appeal docketed* No. 75685 and *State v. Simmons, appeal docketed* No. 75839.

400. The state appellate court should not have been constrained and confined to state supreme court precedents that were decided before this Court's holding in *Bullington*. Under such reasoning, the state appellate court could have believed it could base its decision on the initial holding in *State ex rel. Westfall v. Mason*, 494 S.W.2d 908 (1980), and simply overlook this Court's intervening reversal of that decision.

The only facts that differentiate Bullington's sentencing trial from Bohlen's is the possible outcome, death or life imprisonment, as opposed to imprisonment for a term of years; and the possibility of a jury rather than judge-made fact determination.[19]

> "When a decision of this Court merely has applied settled precedents to new and different factual situations, no real question [of retroactivity] has arisen. . . . In such cases, it has been a foregone conclusion that the rule of the later case applies in earlier cases, because the later decision has not in fact altered that rule in any material way."

Butler v. McKellar, 494 U.S. 407, 425 (Brennan, J., dissenting) (*quoting United States v. Johnson*, 457 U.S. 537, 549 (1982)). Just as the minor differences in the capital sentencing system in Mississippi from the capital-sentencing system in Georgia "could not have been considered a basis for denying relief in light of precedent existing at the time petitioner's sentence became final," so too the differences in Bullington's and Bohlen's sentencing trial did not justify the state court's denial of the requested relief. Just as "the application of the *Godfrey* principle to the Mississippi sentencing process follows,

[19] The Double Jeopardy Clause applies whether the ultimate decision of fact is made by a judge or jury. *See United States v. Wilson*, 420 U.S. at 365 ("Since the double jeopardy clause of the Fifth Amendment nowhere distinguishes between bench and jury trials, the principles given expression through that clause apply to cases tried to a judge.")

a fortiori . . ." *Stringer v. Black*, 112 S. Ct. 1130, 1136 (1992), the application of the principle in *Bullington* to Bohlen's sentencing is the only appropriate result.

Since 1982 *Bullington* has been applied to non-capital sentencing trials on collateral reviews in various federal courts. *See, e.g., Bullard v. Estelle*, 665 F.2d 1347, 1360 (5th Cir. 1982), *vacated on other grounds*, 459 U.S. 1139 (1983); *French v. Estelle*, 692 F.2d 1021, 1025 (5th Cir. 1982) *cert. denied*, 461 U.S. 937 (1983); *Briggs v. Procunier*, 764 F.2d 368, 373 (5th Cir. 1985); *Nelson v. Lockhart*, 828 F.2d 446, 449 (8th Cir. 1987) *reversed on other grounds*, 488 U.S. 33 (1988);[20] *Durosko v. Lewis*, 882 F.2d 357, 359 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 1930 (1990).

Even if this Court were to decide that the decision in the court below was not dictated by *Bullington*, and as such is a "new rule", Bohlen is entitled to relief because the decision is encompassed by the two exceptions enunciated in *Teague*, 489 U.S. at 311-313 (plurality opinion):

> "The first exception permits the retroactive application of a new rule if the rule places a class of private conduct beyond the power of the State to prescribe, [citation omitted] or addresses a 'substantive categorical guarante[e] accorded by the Constitution' such as a rule "prohibiting a certain category of punishment for a class of defendants because of their status or offense." "

Graham v. Collins, 113 S. Ct. 892 (1993) (*quoting Saffle v. Parks*, 494 U.S. at 494, *quoting Penry*, 492 U.S. at 329-330); *see also Butler v. McKellar*, 494 U.S. at 415.

[20] In *Lockhart* the State of Arkansas, Amicus in this case, did not contest the application of the holding in *Bullington* to non-capital sentencing enhancement trials. *Lockhart v. Nelson*, 430 U.S. 33, 37 n.6.

As the Court explained in *Penry*:

> [A] new rule placing a certain class of individuals beyond the State's power to punish . . . is analogous to a new rule placing certain conduct beyond the State's power to punish at all. In both cases, the Constitution itself deprives the State of the power to impose a certain penalty, and the finality and comity concerns underlying Justice Harlan's view of retroactivity have little force. As Justice Harlan wrote: "There is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose."

Penry, 492 U.S. at 330; *see also Butler v. McKellar*, 494 U.S. at 415. (The first *Teague* exception encompasses "'categorical guarantees accorded by the Constitution' such as a prohibition on the imposition of a particular punishment on a certain class of offenders.'"); *McIntyre v. Trickey*, 938 F.2d 899 (8th Cir. 1991) *vacated on other grounds*, 112 S. Ct. 1658 (1992) *on remand* 975 F.2d 437 (1992), *petition for cert. filed* 61 U.S.L.W. 3653 (U.S. March 10, 1993) (No. 92-1465).

"[T]he double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage" *Benton v. Maryland*, 395 U.S. 784, 794 (1969) and a "basic constitutional guarantee". *North Carolina v. Pearce*, 395 U.S. 711, 718 (1969). The Clause operates on an elemental level and when properly invoked no trial can take place. *See Robinson v. Neil*, 409 U.S. 505, 509 (1973). "Because the double jeopardy clause prevents an unconstitutional trial from taking place, it deprives the court of jurisdiction." *McIntyre v. Trickey*, 938 F.2d at 904; *see also Johnson v. Howard*, 963 F.2d 342, 345 (11th Cir. 1992). As Bohlen was "acquitted" at his first trial, he is forever insulated and thus ineligible for persistent offender status on this case.

Respondent also can claim protection from *Teague*'s mandated dismissal under its second exception which allows application of a new rule on collateral review "if it requires the observance of 'those procedures that . . . are implicit in the concept of ordered liberty.'" *Butler v. McKellar*, 494 U.S. 407, 416 (1990).

This second test has been limited to "those new procedures without which the likelihood of an accurate conviction is seriously diminished." *Teague*, 489 U.S. at 313. As already stated, the Double Jeopardy Clause has always been considered a bedrock procedural protection implicit in the concept of ordered liberty. *Crist v. Betz*, 438 U.S. 28, 33 n.8 (1978) (*quoting* 4 BLACKSTONE, COMMENTARIES *335) (It has long been considered a "universal maxim . . . that no man is to be brought into jeopardy of his life, more than once, for the same offense."). Accuracy and reliability have been repeatedly expressed as a concern underlying the purpose and interpretation of the Double Jeopardy Clause.[21] Allowing the State to repeatedly attempt to make its case, each time patching any holes in its previous performance, would forever jeopardize the reliability of each retrial and any resultant conviction.

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[21] "The underlying idea, one that is *deeply ingrained* in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as *enhancing* the possibility that even though innocent he may be found guilty." *Green*, 355 U.S. at 187-188 (emphasis added); *United States v. Wilson*, 420 U.S. 322, 343 (1975); *Scott*, 437 U.S. at 91; *Bullington v. Missouri*, 451 U.S. at 445; *Poland v. Arizona*, 476 U.S. at 156; *see also Arizona v. Washington*, 434 U.S. at 503-504 ("[A second prosecution] increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted.") (footnote omitted); *Tibbs v. Florida*, 457 U.S. at 41 ("Repeated prosecutorial sallies would unfairly burden the defendant and create a risk of conviction through sheer governmental perserverance.").

III. PETITIONER AND AMICI HAVE ESTABLISHED NO REASON SUFFICIENT TO JUSTIFY OVERRULING *BULLINGTON v. MISSOURI*

In the twelve years since *Bullintgon* was decided, this Court has thrice been petitioned to reverse its holding and return to the death penalty jurisprudence that existed in 1919. Two of the three occasions involved direct frontal assaults—death penalty cases that presented many of the same issues that enveloped Robert Bullington. This third attack comes from the flanks.

In *Arizona v. Rumsey*, 467 U.S. 203 (1983), seven of the justices declined the invitation to depart from the doctrine of *stare decisis* because "no reason [had been suggested] sufficient to warrant our taking [that] *exceptional* action. . . ." *Id.* at 212. (emphasis added.)

Again, in 1986, in *Poland v. Arizona*, 476 U.S. 147 (1986), the Court had the option of overturning the *Bullington* decision but instead distinguished Poland's situation from Bullington's, leaving the Court's holding in *Bullington* intact.

The very core of *Bullington*, fundamental to the application of the Double Jeopardy Clause, was that the factfinder in *Bullington* had rejected the state's case for death and " 'ha[d] . . . acquitted the defendant of whatever was necessary to impose [that sentence].' " *Bullington* 451 U.S. at 445, (*quoting State ex rel. Westfall v. Mason*, 594 S.W.2d at 922 (Bardgett, J., dissenting)).

The situation in *Poland*, by contrast, was the polar opposite. Whereas Bullington's status as death-eligible had been decided in his favor, the factfinder and sentencer in *Poland's* case had found *that the death penalty [was] appropriate*." *Poland v. Arizona*, 476 U.S. at 155 (emphasis in original). It is this status determination of eligibility that ditsinguishes *Poland* from *Bullington* and *Bohlen*.

Bohlen's appeal to this Court should be clear-cut; his case has none of the side issues that impacted on Bullington. There are no Eighth Amendment issues that have infused this Court's death penalty jurisprudence since *Trop v. Dulles*, 356 U.S. 86 (1958); *see* Argument ante at 33-36. Although Respondent's sentence was severe "from the point of view of the defendant, [a sentence of death] is different both in its severity and its finality." *Gardner v. Florida*, 430 U.S. 349, 357-358 (1977) (plurality opinion). Indeed since *Furman* the Court has consistently and continually echoed its findings that

> 'the penalty of death differs from all other forms of criminal punishment, not in degree, but in kind. It is unique in its total irrevocability. . . . [A]nd it is unique finally in its absolute renunciation of all that is embodied in our concept of humanity.'

Furman v. Georgia, 408 U.S. 238, 306 (1976) (Stewart, J. concurring). For Respondent the result was critical, for Buliington the result could have been fatal.

Petitioner and Amici, despite considerable rhetoric, are unable to identify those factors routinely examined when this Court considers overruling one of its precedents.

> The obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit. With Cardozo, we recognize that no judicial system could do society's work if it eyed each issue afresh in every case that raised it. See B. Cardozo, The Nature of the Judicial Process 149 (1921). Indeed the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition indispensable. See Powell, Stare Decisis and Judicial Restraint, 1991 Journal of Supreme Court History 13, 16. At the other extreme, a different necessity would make itself felt if a prior judicial ruling should come to be seen so clearly as error that its enforcement was for that very reason doomed.

Planned Parenthood v. Casey, 112 S. Ct. 2791, 2808 (1992) (lead opinion).

Planned Parenthood v. Casey, 112 S. Ct. at 2808, identified the catalysts that have compelled this Court to overrule its precedents. None of these are sufficiently advanced in this case to justify such a drastic and unnecessary step:

> "WHETHER THE RULE HAS PROVED TO BE INTOLERABLE SIMPLY IN DEFYING PRACTICAL WORKABILITY";

There is nothing unworkable in the implementation of the standards set forth in *Bullington*. *See, e.g., United States v. Dixon*, 113 S. Ct. at 2863 (*Dixon* overruled *Grady v. Corbin*, 495 U.S. 508 (1990), in part because in the three years since Grady was announced it "ha[d] already proved unstable in application" and "produced confusion.") If anything, *Bullington* represents a simple, straightforward, bright-line approach to a complex problem. As in all cases of acquittal, if the capital defendant is not found to be death-eligible by the sentencing fact-finder, or if a reviewing court determines that there was insufficient evidence to support such a finding, the State with all its resources and power cannot repeatedly return to court in an effort to prove its once-failed case. Petitioner and Amici suggest no reason to conclude that the application of *Bullington* to presentence trial-like hearings that require proof of the necessary elements of eligibility beyond a reasonable doubt is unworkable or confusing.

> "WHETHER THE RULE IS SUBJECT TO A KIND OF RELIANCE THAT WOULD LEND A SPECIAL HARDSHIP TO THE CONSEQUENCES OF OVERRULING AND ADD INEQUITY TO THE COST OF REPUDIATION";

Any defendant presently appealing a conviction in a capital case wherein his life was spared would necessarily rely on this Court's ruling in *Bullington*. He would have

every reason to believe that if his conviction were overturned because he had received an unfair trial, he could not be compelled to risk death with yet another run through the gantlet. In such cases, if the State wished to bolster its case and take a second "crack" at the defendant, the prosecutor could simply confess a defendant's claim on appeal or in post-trial motions. A defendant caught in this predicament would be forced to forego his right to appeal from an erroneous conviction or risk affording the State yet another opportunity at her life.[22] "The law should not . . . place [a] defendant in such an incredible dilemma." *Green v. United States*, 355 U.S. at 227. Allowing the State an infinite number of opportunities to make its case for death also would invite prosecutorial overreaching at trial. A prosecutor, faced with what he believes to be an unsympathetic jury, or beleagured by unfavorable pre-trial rulings, could be inclined to "push the envelope" of efficacy at trial believing that any resultant reversal would simply give him another opportunity for a more favorable setting.

> "WHETHER RELATED PRINCIPLES OF LAW HAVE SO FAR DEVELOPED AS TO HAVE LEFT THE OLD RULE NO MORE THAN A REMNANT OF ABANDONED DOCTRINE."

Petitioner and Amici have not suggested that *Bullington* has been abandoned. On the contrary the Petitioner's and Amici's complaint is that its holding is routinely and regularly applied in all the states that authorize capital punishment. Its principles have not been abandoned or diluted. *Bullington* remains as viable today as when decided. Petitioner and Amici argue this Court should simply erase *Bullington* from the judicial landscape and apply

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[22] At least one commentator has suggested that a penalty retrial of a defendant who has secured a life sentence at his first trial would unconstitutionally chill his right to appeal. Bennet, *Double Jeopardy and Capital Sentencing: The Trial and Error of the Trial Metaphor*. 19 N.M.L. Rev. 451, 466-479, 485-488 (1989).

the holdings of those cases it distinguished in its stead. The issues decided in *Pearce* and *Chaffin*, and presented in this case did not then and do not now present the Court with the enormities of forcing a capital defendant to stand trial for his life a second time after having convinced the sentencer beyond a reasonable doubt at a previous sentencing trial to reject the State's case for death. For Pearce, Chaffin, and Bohlen the increased sentencing exposure at their second trials meant additional years in prison but because "the penalty of death is qualitatively different from a sentence of imprisonment, however long," *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion), the stakes for a capital defendant defy comparison. Obviously, being compelled to defend against the death penalty a second time subjects the defendant to a unique degree of "personal strain, public embarrassment and expense," [23] of "heavy pressures and burdens—psychological, physical and financial," [24] and of "embarrassment expense and ordeal . . . compelling him to live in a continuing state of anxiety and insecurity. . . ." [25] Where the defendant has already persuaded the factfinder at an earlier sentencing trial to return a verdict against death, forcing him to endure a second capital trial is nothing short of monstrous:

> Such a prosecution . . . [is] cruel and inhuman, imposing on the accused a "hardship so acute and shocking that our policy will not endure it." *Palko v. State of Connecticut*, 302 U.S. 328. . .

United States ex rel. Hetenyi v. Wilkins, 348 F.2d at 857.

There are a myriad of reasons [26] to suggest that the State should not and need not have an infinite number of

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[23] *Abney v. United States*, 431 U.S. 651, 661 (1977).

[24] *Breed v. Jones*, 421 U.S. 519, 530 (1975).

[25] *Green*, 355 U.S. at 187-188.

[26] For example: If prosecutors are permitted to seek the death penalty at capital retrials, when the government has failed to make its case for life at the first trial, a defendant will have the option of avoiding a death sentencing by waiving his Sixth Amendment right to a trial by jury. Under this Court's decision in *North Carolina v. Pearce*, 395 U.S. at 726, a judge is flatly prohibited from imposing a sentence more severe than the one meted out at the first trial, unless there are reasons for a higher sentence "based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original proceeding."

Missouri law permits judicial capital sentencing in "cases tried before a judge." Mo. Rev. Stat. § 565.006.2 (1978). Hence, to come within the protective pneumbra of *Pearce* a defendant must waive his right to a jury not only at the sentencing phase but also at the guilt trial. Under *Jackson v. United States*, 390 U.S. 570 (1968), the state may not constitutionally subject Petitioner to such a choice.

opportunities to try to convince a judge or jury that a defendant should die for his crime. None of those concerns exist for Respondent, they do not impact upon him or on his interest in finality and repose. If Amici seek the vehicle for overturning *Bullington* it should be driven by the same concerns that motivated Bullington and others that face repeated efforts by the State to force them back into the storm to see whether they might the next time be "struck by lightning." *Furman v. Georgia*, 408 U.S. at 309.

The impact of this Court's ruling in capital cases often is literally the difference between life and death for those facing trials or pursuing appeals in capital cases. The doctrine of stare decisis has no more important application than when applied under these circumstances. "The promise of constancy, once given binds its maker for as long as the power to stand by the decision survives and the understanding of the issue has not changed so fundamentally as to render the commitment obsolete." *Planned Parenthood v. Casey*, 112 S. Ct. at 2815. It is precisely this "promise of constancy that those whose convictions have been or potentially could be reversed will be denied.

Once again those seeking *Bullington's* demise have failed to advance sufficient reasons to warrant this Court taking the "exceptional action" of overruling it.

CONCLUSION

The Double Jeopardy Clause of the Fifth Amendment prohibits successive attempts by the State of Missouri to prove Respondent's status as a repeat offender when at his first trial the State failed to introduce sufficient evidence to merit such a finding. The decision of the Court of Appeals for the Eighth Circuit should be affirmed.

Respectfully submitted,

RICHARD H. SINDEL
(Counsel of Record)
SINDEL & SINDEL, P.C.
8008 Carondelet, Suite 301
St. Louis, Missouri 63105
(314) 721-6040
Counsel for Respondent

APPENDIX

APPENDIX

REVISED STATUTES OF MISSOURI, 1978

565.001. Capital murder defined.—Any person who unlawfully, willfully, knowingly, deliberately, and with premeditation kills or causes the killing of another human being is guilty of the offense of capital murder.

565.006. Verdict as to guilt when rendered—finding of guilty, effect of—presentence hearing, admissible evidence—penalty, when imposed—reversible error, effect of —1. At the conclusion of all trials upon an indictment or information for capital murder heard by a jury, and after argument of counsel and proper charge from the court, the jury shall retire to consider consideration of punishment, and by their verdict ascertain, whether the defendant is guilty of capital murder, murder in the first degree, murder in the second degree, manslaughter, or is not guilty of any offense. In nonjury capital murder cases, the court shall likewise first consider a finding of guilty or not guilty without any consideration of punishment, and by its verdict ascertain, whether the defendant is guilty of capital murder, murder in the first degree, murder in the second degree, manslaughter, or is not guilty of any offense.

2. Where the jury or judge returns a verdict or finding of guilty as provided in subsection 1 of this section, the court shall resume the trial and conduct a presentence hearing before the jury or judge at which time the only issue shall be the determination of the punishment to be imposed. In such hearing, subject to the laws of evidence, the jury or judge shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nol contendere of the defendant, or the absence of any such prior criminal convictions and

pleas. Only such evidence in aggravation as the prosecution has made known to the defendant prior to his trial shall be admissible. The jury or judge shall also hear argument by the defendant or his counsel and the prosecuting attorney regarding the punishment to be imposed. The prosecuting attorney shall open and the defendant shall conclude the argument to the jury or judge. Upon conclusion of the evidence and arguments, the judge shall give the jury appropriate instructions and the jury shall retire to determine the punishment to be imposed. In capital murder cases in which the death penalty may be imposed by a jury or judge sitting without a jury, the additional procedure provided in section 565.012 shall be followed. The jury, or the judge in cases tried by a judge, shall fix a sentence within the limits prescribed by law. The judge shall impose the sentence fixed by the jury or judge. If the jury cannot, within a reasonable time, agree to the punishment, the judge shall impose sentence within the limits of the law; except that the judge shall in no instance impose the death penalty when, in cases tried by a jury, the jury cannot agree upon the punishment.

3. If the trial court is reversed on appeal because of error only in the presentence hearing, the new trial which may be ordered shall apply only to the issue of punishment.

565.012. Evidence to be considered in assessing punishment in capital murder cases.—1. In all cases of capital murder for which the death penalty is authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider:

(1) Any of the statutory aggravating circumstances enumerated in subsection 2 which may be supported by the evidence.

(2) Any of the statutory mitigating circumstances enumerated in subsection 3 which may be supported by the evidence.

(3) Any mitigating or aggravating circumstances otherwise authorized by law, and

(4) Whether a sufficient aggravating circumstance or circumstances exist to warrant the imposition of death or whether a sufficient mitigating circumstance or circumstances exist which outweigh the aggravating circumstance or circumstances found to exist.

2. Statutory aggravating circumstances shall be limited to the following:

(1) The offense was committed by a person with a prior record of conviction for capital murder, or the offense was committed by a person who has a substantial history of serious assaultive criminal convictions;

(2) The offense was committed while the offender was engaged in the commission of another capital murder;

(3) The offender by his act of capital murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person;

(4) The offender committed the offense of capital murder for himself or another, for the purpose of receiving money or any other thing of monetary value;

(5) The capital murder was committed against a judicial officer, former judicial officer, prosecuting attorney or former prosecuting attorney, circuit attorney or former circuit attorney, elected official or former elected official during or because of the exercise of his official duty;

(6) The offender caused or directed another to commit capital murder or committed capital murder as an agent or employee of another;

(7) The offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind;

(8) The capital murder was committed against any peace officer, corrections employee, or fireman while engaged in the performance of his official duty;

(9) The capital murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement;

(10) The capital murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

3. Statutory mitigating circumstances shall include the following:

(1) The defendant has no significant history of prior criminal activity;

(2) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(3) The victim was a participant in the defendant's conduct or consented to the act;

(4) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor;

(5) The defendant acted under extreme duress or under the substantial domination of another person;

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;

(7) The age of the defendant at the time of the crime.

4. The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict is a recommendation of death,

shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt.

5. Unless at least one of the statutory aggravating circumstances enumerated in this section is so found, the death penalty shall not be imposed.

557.036. Role of court and jury in sentencing—jury informed penalties.—1. Subject to the limitation provided in subsection 3 upon a finding of guilt upon verdict or plea, the court shall decide the extent or duration of sentence or other disposition to be imposed under all the circumstances, having regard to the nature and circumstances of the offense and the history and character of the defendant and render judgment accordingly.

2. The court shall instruct the jury as to the range of punishment authorized by statute and upon a finding of guilt to assess and declare the punishment as a part of their verdict, unless

(1) The defendant requests in writing, prior to voir dire, that the court assess the punishment in case of a finding of guilt, or

(2) The state pleads and proves the defendant is a prior offender, persistent offender, or dangerous offender, as defined in section 558.016, RSMo.

If the jury finds the defendant guilty but cannot agree on the punishment to be assessed, the court shall proceed as provided in subsection 1 of this section. If there be a trial by jury and the jury is to assess punishment and if after due deliberation by the jury the court finds the jury cannot agree on punishment, then the court may instruct the jury that if it cannot agree on punishment that it may return its verdict without assessing punishment and the court will assess punishment.

3. If the jury returns a verdict of guilty and declares a term of imprisonment as provided in subsection 2 of this

section, the court shall proceed as provided in subsection 1 of this section except that any term of imprisonment imposed cannot exceed the term declared by the jury unless the term declared by the jury is less than the authorized lowest term for the offense, in which event the court cannot impose a term of imprisonment greater than the lowest term provided for the offense.

4. If the defendant is found to be a prior offender, persistent offender, or dangerous offender as defined in section 558.016, RSMo:

(1) If he has been found guilty of a class B, C, or D felony, the court shall proceed as provided in section 558.016, RSMo., or

(2) If he has been found guilty of a class A felony, the court may impose any sentence authorized for a class A felony.

5. The court shall not seek an advisory verdict from the jury in cases of prior offenders, persistent offenders, or dangerous offenders; if an advisory verdict is rendered, the court shall not deem it advisory, but shall consider it as mere surplusage.

No. 92-1500

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1992

Paul Caspari, Superintendent of
the Missouri Eastern Correctional Center,
and Jeremiah W. (Jay) Nixon,
Attorney General of Missouri,
Petitioners,
v.
Christopher Bohlen,
Respondent,

On Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

Reply Brief for Petitioners

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri

FRANK A. JUNG
Assistant Attorney General
Counsel of Record
P. O. Box 899
Jefferson City, Missouri 65102
(314) 751-3321

Attorneys for Petitioners

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I.

RESPONDENT REQUESTS THAT THE COURT RETROACTIVELY APPLY ANY HOLDING THAT THE DOUBLE JEOPARDY CLAUSE APPLIES TO NON-CAPITAL SENTENCING PROCEEDINGS AND REQUESTS THIS COURT TO CREATE AND APPLY A NEW RULE OF CONSTITUTIONAL LAW REGARDING RETROACTIVITY IN HABEAS CORPUS PROCEEDINGS.

This reply brief will discuss the retroactivity that respondent discussed in his brief. Respondent contends that he meets the two exceptions to the prohibition of retroactive application of new rules in habeas corpus proceedings. Petitioners will demonstrate that respondent does not fall within these two limited exceptions.

If this Court were to extend double jeopardy protection to non-capital sentencing enhancement proceedings, this extension would create new law since it "breaks new ground or imposes a new obligation on the State or Federal Government." *Teague v. Lane,* 489 U.S. 288, 301 (1989). Although respondent contends that the application of double jeopardy to non-capital sentence enhancement proceedings is not a new rule, petitioners disagree. The applicaiton of the Double Jeopardy Clause to non-capital sentencing enhancement proceedings is not dictated by past precedents of this Court. *See Lockhart v. Nelson*, 488 U.S. 33, 37 n.6 (1988).

Respondent alleges that even if this Court

determines that the Court of Appeals decision was not dictated by existing precedent, respondent would still be entitled to the benefit of any new law extending double jeopardy to non-capital sentencing proceedings because such a new rule is encompassed by the two exceptions enunciated in *Teague v. Lane*, *supra*.

In *Teague v. Lane*, *supra*, a plurality of this Court announced the standard for determining whether new rules of constitutional law will be given retroactive effect in federal habeas proceedings. The Court held that new rules of constitutional law will not be given retroactive effect in cases on collateral review unless the rule falls within one of two narrow exceptions. *Id.*, 489 U.S. at 310. The first exception states that:

> [A] new rule should be applied retroactively if it places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe."

Teague v. Lane, 489 U.S. at 307, *quoting Mackey v. United States*, 401 U.S. 667, 692 (1971) (separate opinion of Harlan, J.).

In relying on the first exception in *Teague*, respondent cites to *McIntyre v. Trickey*, 938 F.2d 899 (8th Cir. 1991), *vacated*, 112 S.Ct. 1658 (1992), *on remand*, 975 F.2d 437 (1992), *petition for cert. filed* 61 U.S.L.W. 3653 (U.S. March 10, 1992) (No. 92-1465). Respondent claims that the Double Jeopardy

Clause's prohibition against successive prosecution is a categorical guarantee of the Constitution. Although the Eleventh Circuit agreed with the Eighth Circuit's holding in *McIntyre*, *supra*. *See Johnson v. Howard*, 963 F.2d 342 (11th Cir. 1992), the Second Circuit, in *United States v. Salerno*, 964 F.2d 172 (2d Cir. 1992), expressly rejected the Eighth Circuit's holding in *McIntyre*.

> As we have observed, *McIntyre* has been vacated and remanded by the Supreme Court for reconsideration in light of *Felix*. *See, supra* n. 2. In any event, we disagree with the Eighth Circuit's analysis of [retroactivity].

United States v. Salerno, 964 F.2d at 78. The plurality opinion in *Teague v. Lane, supra,* quotes Justice Harlan's concurrence in *Mackey v. United States*, 401 U.S. at 692. In *Mackey*, Justice Harlan identified several examples for the exception that a new rule of law will be applied retroactively "if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'" *Teague v. Lane*, 490 U.S. at 311. These examples include rules that preclude prosecution of: 1) expressive conduct protected by the First Amendment, *Street v. New York*, 394 U.S. 576 (1969); 2) silence protected by the Fifth Amendment, *Grosso v. United States*, 390 U.S. 62 (1968); 3) certain protected intimate behavior, *Loving v. Virginia*, 388 U.S. 1 (1967); and

4) conduct in the constitutionally protected privacy of one's home, *Stanley v. Georges*, 398 U.S. 557 (1969).

Since Respondent's requested new rule does not involve decriminalization of robbery or a prohibition of enhanced sentencing for prior and persistent offenders, the first exception from *Teague* is simply inapplicable. Respondent contends that the fundamental guarantees of double jeopardy are so steeped in tradition that it protects him from being retried as a prior and persistent offender. Respondent also contends that the first exception in *Teague* prohibits the imposition of punishment on a certain class of offender. Petitioners disagree.

Respondent's argument assumes that a repeat offender falls within a protected class. However, respondent cannot seriously contend that the punishment of recividists is a "'certain [kind] of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'" *Teague v. Lane*, 490 U.S. at 311. Repeat offenders or those involved in continuing criminal enterprise do not engage in "private individual conduct" that is beyond the power of legislatures to prohibit. Repeat offenders have been, and should be, punished more severely than first time offenders. Therefore, respondent's contention that he falls within the first exception in *Teague* is without merit.

Respondent also claims that he falls within the second exception in *Teague*. The second

exception to the *Teague* retroactivity analysis states:

> [A] new rule should be applied retroactively if it requires the observance of "those procedures that . . . are 'implicit in the concept of ordered liberty'".

Teague v. Lane, 489 U.S. at 307, *quoting Mackey v. United States*, 401 U.S. at 692.

The plurality opinion departed from Justice Harlan's approach in the second exception. Justice O'Connor's opinion narrowed Justice Harlan's second exception to include only those procedures "without which the likelihood of an accurate conviction is seriously diminished." *Teague v. Lane*, 489 U.S. at 313 (O'Connor, J., concurring).

Again, respondent argues that he meets this exception because the Double Jeopardy Clause is a "bedrock procedural protection implicit in the concept of ordered liberty" (Resp.Br. at 28).[1] Respondent contends that allowing the State to attempt repeatedly to prove prior and persistent offender status would jeopardize the reliability of the

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[1]Petitioners disagree with respondent's contention that the Double Jeopardy Clause is a "bedrock procedural protection implicit in the concept of ordered liberty" (Resp.Br. at 28). Since Double Jeopardy can be waived by pleading guilty, *United States v. Brose*, 488 U.S. 563 (1989), it cannot be an implicit "bedrock" protection.

resentencing. Petitioners again disagree.

The argument that the Double Jeopardy Clause's application to non-capital sentence enhancement proceedings is implicit in the concept of ordered liberty without which the likelihood of an accurate conviction is seriously limited is without merit. Allowing a State a second opportunity to show a defendant's status as a prior and persistent offender does not diminish the likelihood of an accurate conviction or sentence. If a defendant did not have prior convictions, the state would never be able to prove a prior and persistent status. The state cannot fictitiously allege that a defendant is a prior and persistent offender. The state would have to prove that a defendant has prior convictions whether that proof is by a preponderance of the evidence or beyond a reasonable doubt. In most cases, as respondent admits, this will be established through court records from a defendant's prior proceedings. The use of these records, whether during the first proceeding or a proceeding after a remand, does not diminish the likelihood of an accurate conviction, but rather ensures the finding of a prior and persistent status is accurate.

Nothing in respondent's proposed new rule rises to the level contemplated by this Court when it refined the exceptions. Respondent's proposed new rule is not of the same character as the rule against a

mob trial or the right to counsel.

Since the requirement that a defendant is a prior and persistent offender ensures an accurate conviction, petitioner does not establish that he meets the second exception of *Teague*.

CONCLUSION

Petitioners pray that this Court reverse the United States Eighth Circuit Court of Appeals' holding extending the application of *Bullington* to non-capital sentencing proceedings. Furthermore, petitioners request that this Court overrule its' decision in *Bullington* and hold that the Double Jeopardy Clause does not apply to capital or non-capital sentencing proceedings.

Respectfully submitted,

JEREMIAH W. (JAY)NIXON
Missouri Attorney General

FRANK A. JUNG
Assistant Attorney General
Counsel of Record

P. O. Box 899
Jefferson City, MO 65102
(314) 751-3321

Attorneys for Petitioners

No. 92-1500

In the Supreme Court of the United States

OCTOBER TERM, 1993

PAUL CASPARI, SUPERINTENDENT, MISSOURI EASTERN CORRECTIONAL CENTER, ET AL., PETITIONERS

v.

CHRISTOPHER BOHLEN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

RONALD J. MANN
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

The United States will address the following question:

Whether the Double Jeopardy Clause of the Fifth Amendment prohibits a State from introducing new evidence in support of a particular noncapital sentence at a second sentencing proceeding, after the evidence at the first hearing was held insufficient to sustain that sentence.

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In the Supreme Court of the United States

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INTEREST OF THE UNITED STATES

This case involves the application of the Double Jeopardy Clause to noncapital sentencing proceedings. Because the United States as a prosecuting authority is a party to many such proceedings, and because resentencings are frequently required under the federal Sentencing Guidelines, the United States has a significant interest in the Court's disposition of the double jeopardy issue in this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Double Jeopardy Clause of the Fifth Amendment provides: "No person shall * * * be sub-

ject for the same offence to be twice put in jeopardy of life or limb."

2. The relevant portions of Mo. Rev. Stat. §§ 557.036, 558.011, 558.016, and 558.021 (Supp. 1982) are reproduced in the Appendix, *infra*, 1a-5a.

STATEMENT

1. On April 17, 1981, respondent and a number of other individuals entered a jewelry store in St. Louis County, Missouri, held employees and customers at gunpoint, and then robbed the store and its employees of money and jewelry. As a result of that incident, a jury in the Circuit Court of St. Louis County convicted respondent on three counts of first-degree robbery, in violation of Mo. Rev. Stat. § 569.020 (1978). See Pet. App. A4, A27-A28, A57, A63-A64.

Because Missouri law defines first degree robbery as a Class A felony, the authorized term of imprisonment for that crime is "a term of years not less than ten years and not to exceed thirty years, or life imprisonment." Mo. Rev. Stat. § 558.011.1(1) (Supp. 1982).[1] Missouri law generally provides that the jury sets the maximum penalty to be imposed on the defendant. If the court finds the defendant to be a persistent offender, however, the court sets the sentence without regard to the jury's recommendation.

[1] We cite the versions of the relevant Missouri statutes in effect on October 15, 1982, when respondent was sentenced (see Pet. App. A28). Respondent would have been subject to the same term of imprisonment under the sentencing schedule in effect at the time of the offense, which was enacted at 1979 Mo. Laws 633 and codified at Mo. Rev. Stat. § 558.011 (Supp. 1980).

Mo. Rev. Stat. § 557.036.4 (Supp. 1982).[2] A persistent offender is any person "who has pleaded guilty to or has been found guilty of two or more felonies committed at different times." Mo. Rev. Stat. § 558.016.3 (Supp. 1982).[3] The persistent-offender sentencing procedure requires the State to establish the defendant's persistent-offender status beyond a

[2] Section 557.036 establishes the jury's role in sentencing rather circuitously. First, Section 557.036.2 requires the court to instruct the jury to "assess and declare the punishment as a part of their verdict." Section 557.036.3 then requires the court to select a sentence under Section 557.036.1, which requires a determination of punishment "having regard to the nature and circumstances of the offense and the history and character of the defendant." Section 557.036.3 also provides, however, that the term selected by the court under Section 557.036.1 cannot be longer than the term selected by the jury unless the jury selected a term shorter than the shortest term provided for the offense by statute (in which case the judge cannot impose a term of imprisonment longer than the shortest permissible term). The jury's involvement in the process is bypassed when the defendant is a persistent offender, because in that event "[t]he court shall not seek an advisory verdict from the jury," and if the jury renders such a verdict, "the court shall not deem it advisory, but shall consider it as mere surplusage." Mo. Rev. Stat. § 557.036.5 (Supp. 1982).

[3] With respect to Class A felonies, a persistent-offender determination does not alter the sentencing range, but simply shifts sentencing authority to the judge. Mo. Rev. Stat. § 557.036.4(2) (Supp. 1982) ("If [the defendant] has been found guilty of a class A felony, the court may impose any sentence authorized for a class A felony."); *id.* § 558.016.6 (1) (Supp. 1982) ("The total authorized maximum ter[m] of imprisonment for a persistent offender * * * [is]: (1) For a class A felony, any sentence authorized for a class A felony."). The court of appeals' contrary statement (Pet. App. A13-A14) is incorrect.

reasonable doubt. Mo. Rev. Stat. § 558.021.1(2) (Supp. 1982). In this case, the trial court sentenced respondent as a persistent offender and imposed three consecutive terms of 15 years' imprisonment. J.A. A11-A17; see Pet. App. A4, A27-A28, A38, A73-A74.

2. On direct appeal, the Missouri Court of Appeals affirmed respondent's convictions but remanded for resentencing. Pet. App. A63-A74. The court explained that "although [respondent] was sentenced by the judge as a persistent offender no proof was made of the prior convictions." *Id.* at A73. Accordingly, the court remanded the case to the trial court to allow it to reconsider respondent's persistent-offender status. *Id.* at A74.

3. On remand, the State introduced evidence that respondent had four prior felony convictions. Respondent argued that the Double Jeopardy Clause barred the State from introducing evidence that had not been introduced at the original trial and sentencing hearing. The trial court rejected that argument, determined that respondent was a persistent offender, and imposed the same sentence it had imposed at the first sentencing hearing—three consecutive terms of 15 years' imprisonment. J.A. A18-A35; see Pet. App. A5, A39-A40.

4. Respondent appealed again, and the Missouri Court of Appeals affirmed in all respects. Pet. App. A57-A62. With respect to respondent's resentencing, the court simply noted that "[t]he question of double jeopardy was not involved because those provisions of the Fifth Amendment have been held not to apply to sentencing." *Id.* at A58 (citing *State* v. *Lee*, 660 S.W.2d 394, 399 (Mo. Ct. App. 1983)).

5. Respondent then sought postconviction relief in the state trial court. That court denied relief, and the Missouri Court of Appeals affirmed, explaining that it had rejected respondent's Double Jeopardy claim on the appeal from respondent's resentencing. *Bohlen* v. *State*, 743 S.W.2d 425, 429 (Mo. Ct. App. 1987); see Pet. 13.

6. In 1989, respondent filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Missouri. The petition was referred to a magistrate, who wrote a lengthy report recommending that the petition be denied. Pet. App. A27-A56. In particular, the magistrate recommended rejection of respondent's argument that this Court's decision in *Bullington* v. *Missouri*, 451 U.S. 430 (1981), barred the State from introducing evidence of respondent's prior convictions at the second sentencing hearing. Pet. App. A37-A49. That conclusion rested on the magistrate's view that "the initial sentencing hearing did *not* have the hallmarks of an adversary trial on guilt or innocence." *Id.* at A47. The magistrate explained that the parties did not make opening and closing statements and that the proceeding was, "for all practical purposes, a non-adversarial proceeding * * * [in which the] sentencing judge could select from a wide range of possible sentences to implement at his discretion." *Id.* at A48. The district court adopted the magistrate's report by order. *Id.* at A25-A26.

7. The court of appeals reversed. Pet. App. A3-A24. The court viewed the question before it as whether this Court's decision in *Bullington* applies to sentencing proceedings in noncapital cases. The court first noted that under *Teague* v. *Lane*, 489 U.S. 288

(1989) (plurality opinion of O'Connor, J.), it could grant relief for respondent if applying *Bullington* to noncapital cases would not be a new rule. Pet. App. A6-A8. The court then examined this Court's decisions in *Burks* v. *United States*, 437 U.S. 1 (1978), and *Bullington* (both of which were decided before petitioner's conviction became final in 1985), and concluded that those decisions dictated granting the relief sought by respondent. Pet. App. A9-A16. The court explained that Missouri's persistent-offender sentencing enhancement procedure "has protections similar to those in the capital sentencing hearing in *Bullington*," and rejected the State's argument that *Bullington* "does not extend to non-capital cases." *Id.* at A12-A14. The court also rejected the State's argument that the decision of the Missouri Court of Appeals was reasonable in light of similar decisions by federal courts of appeals. *Id.* at A17-A23. Accordingly, the court held that respondent's resentencing violated the Double Jeopardy Clause, and it directed that he be resentenced without application of the persistent-offender statute. *Id.* at A23.

SUMMARY OF ARGUMENT

This Court has recognized a fundamental distinction between the portion of a criminal proceeding that determines guilt or innocence and the portion that determines the appropriate punishment. Many of the protections that the Constitution requires in a criminal trial, such as the right to a jury, the right to confront adverse witnesses, and the requirement that the prosecution prove its case beyond a reasonable doubt, do not apply in the sentencing context. The double jeopardy prohibition against reprosecution

after an acquittal has also been held generally inapplicable to sentencing. For double jeopardy purposes, the Court has held that the selection of a sentence ordinarily does not have the finality of a verdict of acquittal. Hence, this Court has recognized as a general rule that courts may conduct new sentencing proceedings and may alter previously entered sentences without violating the Double Jeopardy Clause.

The decision in *Bullington* v. *Missouri*, 451 U.S. 430 (1981), articulated a narrow exception to that general rule, based on the unique nature of the modern capital sentencing hearing. As the Court explained in *Bullington*, Missouri (like other States with the death penalty) has invested its capital sentencing procedures with many of the hallmarks of a trial on guilt or innocence, so that the capital sentencing hearing closely resembles the main trial. The *Bullington* Court reasoned that the close resemblance of the capital sentencing hearing to an actual trial justified extending the Double Jeopardy Clause to ensure the finality of the result of the capital sentencing hearing.

The rule of *Bullington* should not be extended to a case such as this one. The hearing at issue here bears little resemblance to a trial on the question of guilt or innocence. The only significant difference between a traditional sentencing proceeding and the proceeding at issue in this case is that in order to establish a defendant's persistent-offender status, the State must prove the defendant's prior convictions beyond a reasonable doubt. Given the sentencing court's freedom to consider a wide variety of factors in selecting a sentence and the court's discretion to choose a sentence from within a broad statutory

range, the hearing closely resembles the traditional sentencing proceeding and has little in common with the elaborate capital sentencing proceeding that was before the Court in *Bullington*. For that reason, this case calls for application of the traditional rule that the prohibition against reprosecution after an acquittal does not apply to sentencing proceedings; it does not call for application of the narrow exception to that rule that the Court devised in *Bullington*.

ARGUMENT

THE DOUBLE JEOPARDY CLAUSE DOES NOT BAR THE STATE FROM SEEKING A PARTICULAR SENTENCE AT A SECOND NONCAPITAL SENTENCING HEARING AFTER THE EVIDENCE AT THE FIRST HEARING WAS HELD INSUFFICIENT TO SUSTAIN THE SENTENCE IMPOSED

The guarantee of the Double Jeopardy Clause consists of "three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *North Carolina* v. *Pearce*, 395 U.S. 711, 717 (1969) (footnotes omitted). This case involves the first of those protections, against reprosecution after acquittal. The question presented is whether that protection attaches at a noncapital sentencing proceeding. We submit that it does not.

A. The Double Jeopardy Clause's Prohibition Of Reprosecution After An Acquittal Generally Does Not Apply At Sentencing Proceedings

Our criminal justice system recognizes a fundamental distinction between the tasks of determining

guilt and imposing sentence. Among other things, the government must prove its case regarding factual guilt beyond a reasonable doubt, *In re Winship*, 397 U.S. 358, 361-364 (1970); the government's proof at trial is subject to the Confrontation Clause of the Sixth Amendment as well as other nonconstitutional rules that limit the evidence that the government can present; and for serious offenses the defendant is entitled to a trial by jury. The sentencing process is much more flexible. The government need satisfy only the preponderance-of-the-evidence standard, see *McMillan* v. *Pennsylvania*, 477 U.S. 79, 91-93 (1986). The sentence may be (and, except in capital cases, typically is) imposed by the court rather than a jury, see *Spaziano* v. *Florida*, 468 U.S. 447, 457-465 (1984). And the Confrontation Clause does not limit the evidence that the sentencer may consider—rather, the sentence may be based on "the fullest information possible concerning the defendant's life and characteristics," *Williams* v. *New York*, 337 U.S. 241, 247 (1949), and may be the product of "an inquiry broad in scope, largely unlimited either as to the kind of information [the judge] may consider, or the source from which it may come," *United States* v. *Tucker*, 404 U.S. 443, 446-447 (1972).[4]

The fundamental distinction between determining guilt and imposing sentence is reflected in this Court's

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[4] The sentencing procedure must be sufficiently reliable to satisfy due process, see *Townsend* v. *Burke*, 334 U.S. 736, 741 (1948), but "[t]he fact that due process applies [at sentencing] does not, of course, implicate the entire panoply of criminal trial procedural rights." *Gardner* v. *Florida*, 430 U.S. 349, 358 n.9 (1977) (plurality opinion of Stevens, J.).

decisions interpreting the Double Jeopardy Clause. As the Court noted in *United States* v. *DiFrancesco*, 449 U.S. 117 (1980), an approach under which the pronouncement of a particular sentence was to be treated as "an 'implied acquittal' of any greater sentence" would result in an extension to sentencing of the finality the Constitution mandates for acquittals. *Id.* at 133. The *DiFrancesco* Court rejected that approach as being inconsistent with historical practice and the Court's own decisions. First, the Court explained, "fundamental distinctions between a sentence and an acquittal * * * [h]istorically [have deprived] the pronouncement of sentence * * * [of] the finality that attaches to an acquittal." *Ibid.* For example, the English common-law system allowed a judge to increase a sentence imposed on a defendant at any time during the term of court in which the judge imposed the original sentence. *Id.* at 133-134. Similarly, the Court explained, it is an "established practice in the federal courts that the sentencing judge may recall the defendant and increase his sentence * * * so long as he has not yet begun to serve that sentence." *Id.* at 134. Neither of those practices would be consistent with the notion that pronouncement of sentence implicitly acquits the defendant of any greater sentence.

In accord with that historical tradition, the Court repeatedly has permitted trial courts in a variety of contexts to impose a higher sentence than the one imposed at the time of the original sentencing proceeding. See, *e.g.*, *North Carolina* v. *Pearce*, 395 U.S. at 719-721 ("[T]he guarantee against double jeopardy imposes no restrictions upon the length of a sentence imposed upon reconviction," and "the power to retry * * * is the power, upon the defendant's reconviction, to impose whatever sentence may

be legally authorized, whether or not it is greater than the sentence imposed after the first conviction."); *Bozza* v. *United States*, 330 U.S. 160, 166-167 (1947) (trial court corrected error in sentence later on the day of sentencing); *Stroud* v. *United States*, 251 U.S. 15, 16-18 (1919) (trial court imposed death penalty upon retrial after first conviction was reversed on appeal, even though Stroud had not received death penalty after first conviction; Court explained that imposition of a harsher sentence had not "placed [Stroud] in second jeopardy within the meaning of the Constitution"); see also *Chaffin* v. *Stynchcombe*, 412 U.S. 17, 23-25 (1973) (discussing *Stroud* and *Pearce*). In sum, the Court has generally declined to apply the Double Jeopardy Clause's prohibition of reprosecution after an acquittal outside the context of a criminal trial on the issue of guilt or innocence.

B. The Prohibition Of Reprosecution After An Acquittal Applies To Sentencing Only When The Earlier Sentencing Proceeding Was Functionally Equivalent To A Trial On The Issue Of Guilt Or Innocence

The decision of the court of appeals to invoke the Double Jeopardy Clause in this case rested on this Court's holding in *Bullington* v. *Missouri*, 451 U.S. 430 (1981). In *Bullington*, the jury had declined to impose the death penalty at the time of the original trial and conviction. A new trial was then granted on grounds unrelated to the sentence. The prosecution announced its intention to seek the death penalty in the second proceeding. This Court, however, held that the Double Jeopardy Clause barred the State from seeking the death penalty after the jury at the first trial had declined to impose that penalty.

The Court in *Bullington* did not purport to overrule the general principle that the Double Jeopardy Clause's prohibition against reprosecution after acquittal is not applicable to sentencing proceedings. Rather, the Court's opinion focused on the unique features of modern capital sentencing proceedings, which give those proceedings "the hallmarks of the trial on guilt or innocence." *Bullington*, 451 U.S. at 439. As the Court explained, the jury at Bullington's capital sentencing proceeding, unlike the sentencer in a conventional sentencing proceeding, did not have "discretion to select an appropriate punishment from a wide range authorized by statute," but instead had to make "a choice between two alternatives." *Id.* at 438. Moreover, the procedure at issue in *Bullington* required the prosecution to undertake "the burden of establishing certain facts beyond a reasonable doubt in its quest to obtain the harsher of the two alternative verdicts." *Ibid.*[5]

[5] Of the 37 States that permit capital punishment, 26 require by statute that at least one aggravating circumstance be found beyond a reasonable doubt. See Ark. Code Ann. § 5-4-603(a)(1) (Michie Supp. 1991); Colo. Rev. Stat. Ann. § 16-11-103(1)(d) (West Supp. 1992); Del. Code Ann. tit. 11, §§ 4209(d)(1)(a), 4209(e) (Supp. 1992); Idaho Code § 19-2515(g) (1987); 720 Ill. Compiled Stat. 5/9-1(f) (Supp. 1993); Ind. Code Ann. § 35-50-2-9(a) (Burns Supp. 1992); Ky. Rev. Stat. Ann. § 532.025(3) (Michie 1990); La. Code Crim. Proc. Ann. art. 905.3 (West Supp. 1993); Md. Ann. Code art. 27, § 413(d) (Supp. 1992); Miss. Code Ann. § 99-19-103 (Supp. 1992); Mo. Rev. Stat. § 565.030.4(1) (Supp. 1993); N.H. Rev. Stat. Ann. § 630:5.III (Supp. 1992); N.J. Stat. Ann. § 2C:11-3.c(2)(a) (West Supp. 1993); N.M. Stat. Ann. § 31-20A-9 (Michie 1990); N.C. Gen. Stat. § 15A-2000(c)(1) (1992); Ohio Rev. Code Ann. § 2929.04(B) (Anderson 1993); Okla. Stat. Ann. tit. 21, § 701.11 (West Supp. 1993); Or. Rev. Stat. § 163.150(1)(d) (1990); 42 Pa. Cons. Stat. Ann. § 9711(c)(1)(iii) (1982); S.C. Code Ann. § 16-3-20(C) (Law Co-op. Supp. 1992); S.D. Codified Laws Ann. §§ 23A-27A-5, 23A-27A-6 (1988); Tenn. Code Ann. § 39-13-204(f) (1991); Tex. Code Crim. Proc. Ann. art. 37.071.2(c) (West Supp. 1993); Va. Code Ann. § 19.2-264.4.C (Michie 1990); Wash. Rev. Code Ann. § 10.95.060(4) (West 1990); Wyo. Stat. § 6-2-102(e) (Supp. 1992); see also Ga. Code Ann. § 17-10-30(c) (1990) (imposing that requirement in all cases except those involving aircraft hijacking and treason). The federal continuing criminal enterprise death penalty statute, 21 U.S.C. 848(j), contains a similar requirement. The federal air piracy statute, however, requires that aggravating circumstances be proved only by a preponderance of the evidence. 49 U.S.C. App. 1473(c)(5).

In six States in which the statute is silent as to the burden of proof, the courts have interpreted the statute to require proof of at least one aggravating factor beyond a reasonable doubt. See *Whisenhant* v. *State*, 482 So. 2d 1225, 1235 (Ala. Crim. App. 1982) (interpreting predecessor to Ala. Code § 13A-5-47(e)), aff'd in relevant part, *Ex parte Whisenhant*, 482 So. 2d 1241, 1245 (Ala. 1983); *State* v. *Brewer*, 826 P.2d 783, 800 (Ariz.) (interpreting Ariz. Rev. Stat. Ann. § 13-703.C), cert. denied, 113 S. Ct. 206 (1992); *State* v. *Daniels*, 542 A.2d 306, 312-313 (Conn. 1988) (interpreting Conn. Gen. Stat. § 53a-46a(c)); *Johnson* v. *State*, 438 So. 2d 774, 779 (Fla. 1983) (interpreting Fla. Stat. Ann. § 921.141(3)), cert. denied, 465 U.S. 1051 (1984); *State* v. *Joubert*, 399 N.W.2d 237, 247 (Neb. 1986) (interpreting Neb. Rev. Stat. § 29-2522), cert. denied, 484 U.S. 905 (1987); *Gallego* v. *State*, 711 P.2d 856, 862 (Nev. 1985) (interpreting Nev. Rev. Stat. Ann. § 200.030.4(a)), cert. denied, 479 U.S. 871 (1986); see also *State* v. *Lafferty*, 749 P.2d 1239, 1260 (Utah 1988) (holding that Utah Code Ann. § 76-3-207(2) requires the State to prove beyond a reasonable doubt that defendant committed the crime which was being treated as an aggravating factor), aff'd on reconsideration, 776 P.2d 631 (Utah

Under the Missouri capital sentencing statute, as the Court noted, counsel could make opening statements, testimony was taken, evidence was introduced,

the jury was instructed, and final arguments were made. The jury then deliberated and returned its formal punishment verdict. *Bullington*, 451 U.S. at 438-439 n.10. The sentencing hearing therefore "resembled and, indeed, in all relevant respects was like the immediately preceding trial on the issue of guilt or innocence. It was itself a trial on the issue of punishment so precisely defined by the Missouri statutes." 451 U.S. at 438.

By contrast, the Court explained, sentencing proceedings ordinarily do not resemble trials on the issue of guilt or innocence. The sentencer typically has broad discretion to select a sentence from within a range of sentences, not "only two choices, death or life imprisonment." *Bullington*, 451 U.S. at 440. And even where sentencing proceedings call on the prosecution to estabilsh particular facts in order to justify a particular sentence, the standard of proof is typically the preponderance-of-the-evidence standard rather than the beyond-a-reasonable-doubt standard imposed in the Missouri capital sentencing proceeding. 451 U.S. at 441.

Because those features of the sentencing proceeding at Bullington's initial trial made "the sentencing pro-

1989). But see *People* v. *Marshall*, 790 P.2d 676, 690-691 (Cal. 1990) (upholding death sentence imposed without beyond-a-reasonable-doubt .nstruction), cert. denied, 498 U.S. 1110 (1991).

Finally, several States also require proof beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors. See Ark. Code Ann. § 5-4-603(a)(2) and (3) (Michie Supp. 1991) (requiring proof beyond a reasonable doubt that aggravating factors outweigh mitigating factors); N.J. Stat. Ann. § 2C:11-3.c(3)(a) (West Supp. 1993) (same); Tenn. Code Ann. § 39-13-204(f) (1991) (same); *State* v. *Wood*, 648 P.2d 71, 83 (Utah 1982) (interpreting Utah statute to reach same result).

ceeding at [his] first trial * * * like the trial on the question of guilt or innocence," the Court reasoned that Bullington was entitled to "the protection afforded by the Double Jeopardy Clause to one acquitted by a jury." *Bullington*, 451 U.S. at 446. That reasoning reflects the Court's conclusion that when the capital sentencing proceeding is so much like the portion of the proceeding that determines guilt or innocence, the protections of the Double Jeopardy Clause available to the defendant at the guilt-determining portion of the trial should extend to the sentencing phase as well. See *Spaziano* v. *Florida*, 468 U.S. at 458-459 ("This Court * * * has recognized that a capital proceeding in many respects resembles a trial on the issue of guilt or innocence" in ways "significant to the Double Jeopardy Clause.").[6]

That analysis closely parallels the Court's reasoning in *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975), where the Court noted that the State's allocation of responsibility between the factfinder and sentencer does not invariably define the reach of the federal constitutional protections applicable in criminal trials. The Court made clear in *Mullaney* that although a State enjoys substantial latitude in defining crimes and devising sentencing procedures, it could not avoid the constitutional protections applicable to criminal trials simply by defining some traditional element of a crime as a sentencing factor and leaving the deter-

[6] The Court distinguished *Stroud* v. *United States*, *supra*, on that ground, noting that although the Court in *Stroud* had held that the Double Jeopardy Clause does not prohibit the enhancement of sentence at a second sentencing proceeding, the sentencing proceeding in that case "did not have the hallmarks of the trial on guilt or innocence." *Bullington*, 451 U.S. at 439; see also *id.* at 446.

mination of that element to the sentencer under the more relaxed procedures applicable to sentencing. See *Mullaney*, 421 U.S. at 698-699 (reach of beyond-a-reasonable-doubt rule turns on "substance rather than * * * formalism * * * [and] requires an analysis that looks to the operation and effect of the law as applied and enforced by the State" (internal quotation marks omitted)); see *Patterson* v. *New York*, 432 U.S. 197, 210-211 (1977) (*Mullaney*'s approach imposes "constitutional limits beyond which the States may not go" in the process of redefining elements of crimes as affirmative defenses).

The Court employed a similar approach in *Specht* v. *Patterson*, 386 U.S. 605 (1967). There, the Court invalidated a Colorado sentencing scheme that in effect subjected the defendant to a separate criminal proceeding carrying significant new penalties under the guise of enhancing his sentence for an underlying offense. Because the sentencing proceeding afforded the defendant none of the protections of a criminal trial, even though it effectively exposed him to criminal punishment on a new charge, the Court concluded that the Colorado scheme failed to satisfy the requirements of due process.

As the Court did in *Mullaney* and *Specht*, it declared in *Bullington* that the line between the trial on the merits and the sentencing proceeding was not entirely dictated by the State's allocation of some responsibilities to the trier of fact and others to the sentencer. Instead, it required a functional analysis. Because the Court determined that the gravity and character of the sentencing proceeding in *Bullington* made it the functional equivalent of the trial on guilt or innocence, it found that the Double Jeopardy

Clause should protect the finality of the result of that proceeding.

C. The Court Of Appeals Erred In Applying *Bullington* To A Proceeding That Is Not Functionally Equivalent To A Trial On Guilt Or Innocence

The proceeding to determine persistent-offender status under Missouri law is quite different from the proceeding at issue in *Bullington*. Because a persistent-offender sentencing hearing is not the functional equivalent of a trial on the issue of guilt or innocence, the court of appeals erred in holding that *Bullington* applies in the context of this case.

The Court in *Bullington* noted several factors that informed its decision that the Double Jeopardy Clause should protect the finality of the determination at the initial capital sentencing proceeding in that case. As the court of appeals stated (Pet. App. A13), the requirement that the government prove its case beyond a reasonable doubt was one of those factors. See *Bullington*, 451 U.S. at 438. But reading *Bullington* to require application of the Double Jeopardy Clause solely because the State has undertaken the burden of proving its case beyond a reasonable doubt ignores much of the analysis of the Court's opinion in *Bullington*.[7] As we have explained above, the opinion in

[7] The court of appeals noted other factors that it viewed as supporting its holding. See Pet. App. A13-A14 (stating that Missouri law requires a charging document to plead all facts supporting persistent-offender status, that the trial court must make findings of fact, and that the defendant has rights of confrontation, cross-examination, and the right to present evidence). None of those factors appeared to be critical to the Court's analysis in *Bullington*, and, in our view, those factors do not either individually or collectively

Bullington appears to rest not on any single factor, but on the juxtaposition of a variety of factors that, taken in combination, rendered the proceeding in *Bullington* a trial on the question of life or death, indistinguishable as a practical matter from the earlier trial on the question of guilt or innocence. Hence, the lower court erred in construing *Bullington* to require a freewheeling examination of every sentencing process adopted by each prosecuting jurisdiction in the country to determine whether the process bears any of the hallmarks of the principal trial. *Bullington* applies only when the process bears all of those hallmarks, and thus is functionally equivalent to the principal trial. Under current sentencing procedures in the state and federal systems, that occurs only in capital sentencing hearings.

An examination of the hearing at issue in this case reveals significant differences from the capital sentencing hearing at issue in *Bullington*. Most obviously, unlike the capital sentencing hearing in *Bullington*—which required a choice between life imprisonment and the death penalty—the hearing in this case did not involve the sort of decisive yes/no question that has a sufficiently fundamental effect on the

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offer a substantial basis for distinguishing the proceeding in question here from traditional noncapital sentencing proceedings. We note that several of those rights are analogous to rights provided by the Federal Rules of Criminal Procedure. See Fed. R. Crim. P. 32(a)(1) (requiring advance notice of the basis for the defendant's sentence, as well as an opportunity for the defendant to respond and present responsive information), 32(c)(3)(A) (defendant has opportunity, in discretion of court, to introduce evidence regarding disputed information in presentence report), and 32(c)(3)(D) (court must make a written record of findings with respect to controverted facts).

outcome of the trial as a whole to justify a constitutional rule of finality. Like most factual findings that are relevant at sentencing, the question whether respondent was a persistent offender was only a subsidiary finding that slightly altered the boundaries of what otherwise remains a traditional and relatively open-ended sentencing process.[8] Even after the determination is made, the sentencer will have the discretion to select a sentence from among a wide range of sentences (in this case, ranging from ten years to life imprisonment). To treat such a proceeding as the functional equivalent of a trial, and thus to equate the State's failure to prove its case at that proceeding with the State's failure to estabilsh guilt at trial, would strip *Bullington* from its moorings and ignore the contrary historical tradition with respect to sentencing proceedings.

The same conclusion follows *a fortiori* for even more conventional sentencing proceedings such as those conducted by federal courts under the Sentencing Guidelines. In those proceedings, the sentencing court resolves any factual disputes under a preponderance-of-the-evidence standard. See, *e.g.*, *United States* v. *Restrepo*, 946 F.2d 654, 655 (9th Cir. 1991) (en banc) ("Every circuit that has considered the question" has approved use of the preponderance standard at sentencing proceedings under the Sentencing Guidelines.) (citing cases from ten

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[8] Indeed, in the case of the statute at issue here, the finding that a defendant is a persistent offender has a particularly minimal effect, because that finding does not even alter the sentencing range; it simply frees the court to impose sentence without obtaining a recommendation from the jury. See note 3, *supra*.

of the courts of appeals), cert. denied, 112 S. Ct. 1564 (1992); see also *Kinder* v. *United States*, 112 S. Ct. 2290, 2291-2292 (1992) (White, J., dissenting from denial of certiorari) (all "Circuits recognize that the preponderance standard ordinarily pertains" at sentencing). Also, as in this case, the determination of any particular fact made relevant by the Sentencing Guidelines does not deprive the sentencer of relatively unguided discretion to select a sentence from within the Guidelines sentencing range. See 18 U.S.C. 3742(a) and (b) (1988 & Supp. III 1991) (no appeal from sentence within sentencing range established by Sentencing Guidelines). Moreover, the sentencer retains significant discretion to impose any sentence permitted by statute if it determines that the case involves a "circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." 18 U.S.C. 3553(b).

Even though the Missouri persistent-offender proceeding is an unusual sentencing proceeding and has characteristics that distinguish it from the more conventional sentencing schemes, it is still sufficiently different from a trial on the issue of guilt or innocence that the Double Jeopardy analysis of *Bullington* does not apply. The court of appeals was therefore in error in applying *Bullington* to the sentencing proceeding in this case and directing that respondent be resentenced without invocation of the Missouri persistent-offender procedures.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

RONALD J. MANN
Assistant to the Solicitor General

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557.036. Role of court and jury in sentencing—jury informed of penalties.—1. Subject to the limitation provided in subsection 3 upon a finding of guilt upon verdict or plea, the court shall decide the extent or duration of sentence or other disposition to be imposed under all the circumstances, having regard to the nature and circumstances of the offense and the history and character of the defendant and render judgment accordingly.

2. The court shall instruct the jury as to the range of punishment authorized by statute and upon a finding of guilt to assess and declare the punishment as a part of their verdict, unless

(1) The defendant requests in writing, prior to voir dire, that the court assess the punishment in case of a finding of guilt, or

(2) The state pleads and proves the defendant is a prior offender, persistent offender, or dangerous offender, as defined in section 558.016, RSMo.

If the jury finds the defendant guilty but cannot agree on the punishment to be assessed, the court shall proceed as provided in subsection 1 of this section. If there be a trial by jury and the jury is to assess punishment and if after due deliberation by the jury the court finds the jury cannot agree on punishment, then the court may instruct the jury that if it cannot agree on punishment that it may return its verdict without assessing punishment and the court will assess punishment.

3. If the jury returns a verdict of guilty and declares a term of imprisonment as provided in subsection 2 of this section, the court shall proceed as pro-

vided in subsection 1 of this section except that any term of imprisonment imposed cannot exceed the term declared by the jury unless the term declared by the jury is less than the authorized lowest term for the offense, in which event the court cannot impose a term of imprisonment greater than the lowest term provided for the offense.

4. If the defendant is found to be a prior offender, persistent offender, or dangerous offender as defined in section 558.016, RSMo:

(1) If he has been found guilty of a class B, C, or D felony, the court shall proceed as provided in section 558.016, RSMo, or

(2) If he has been found guilty of a class A felony, the court may impose any sentence authorized for a class A felony.

5. The court shall not seek an advisory verdict from the jury in cases of prior offenders, persistent offenders, or dangerous offenders; if an advisory verdict is rendered, the court shall not deem it advisory, but shall consider it as mere surplusage.

558.011. Sentence of imprisonment, terms—conditional release.—1. The authorized terms of imprisonment, including both prison and conditional release terms, are:

(1) For a class A felony, a term of years not less than ten years and not to exceed thirty years, or life imprisonment;

(2) For a class B felony, a term of years not less than five years and not to exceed fifteen years;

(3) For a class C felony, a term of years of [*sic*] not to exceed seven years;

(4) For a class D felony, a term of years not to exceed five years;

(5) For a class A misdemeanor, a term not to exceed one year;

(6) For a class B misdemeanor, a term not to exceed six months;

(7) For a class C misdemeanor, a term not to exceed fifteen days.

* * * * *

558.016. Extended terms for persistent or dangerous offenders—definitions.—1. The court may sentence a person who has pleaded guilty to or has been found guilty of a class B, C, or D felony to a term of imprisonment as authorized by section 558.011, if it finds the defendant is a prior offender, or to an extended term of imprisonment if it finds the defendant is a persistent offender or a dangerous offender.

2. A **"prior offender"** is one who has pleaded guilty to or has been found guilty of one felony.

3. A **"persistent offender"** is one who has pleaded guilty to or has been found guilty of two or more felonies committed at different times.

4. A **"dangerous offender"** is one who:

(1) Is being sentenced for a felony during the commission of which he knowingly murdered or endangered or threatened the life of another person or knowingly inflicted or attempted or threatened to inflict serious physical injury on another person; and

(2) Has pleaded guilty to or has been found guilty of a class A or B felony or a dangerous felony.

5. The pleas or findings of guilty shall be prior to the date of commission of the present offense.

6. The total authorized maximum terms of imprisonment for a persistent offender or a dangerous offender are:

(1) For a class A felony, any sentence authorized for a class A felony;

(2) For a class B felony, a term of years not to exceed thirty years;

(3) For a class C felony, a term of years not to exceed fifteen years;

(4) For a class D felony, a term of years not to exceed ten years.

558.021. **Extended term procedures.**—1. The court shall find the defendant to be a prior offender, persistent offender, or dangerous offender, if

(1) The indictment or information, original or amended, or the information in lieu of an indictment pleads all essential facts warranting a finding that the defendant is a prior offender, persistent offender, or dangerous offender; and

(2) Evidence is introduced that establishes sufficient facts pleaded to warrant a finding beyond a reasonable doubt that the defendant is a prior offender, persistent offender, or dangerous offender; and

(3) The court makes findings of fact that warrant a finding beyond a reasonable doubt by the court that the defendant is a prior offender, persistent offender, or dangerous offender.

2. In a jury trial, the facts shall be pleaded, established and found prior to submission to the jury outside of their hearing, except the facts required by subdivision (1) of subsection 4 of section 558.016 may be established and found at a later time, but prior to sentencing, and may be established by judicial notice of prior testimony before the jury.

3. In a trial without a jury or upon a plea of guilty, the court may defer the proof and findings of such facts to a later time, but prior to sentencing.

The facts required to subdivision (1) of subsection 4 of section 558.016 may be established by judicial notice of prior testimony or the plea of guilty.

4. The defendant shall be accorded full rights of confrontation and cross-examination, with the opportunity to present evidence, at such hearings.

5. The defendant may waive proof of the facts alleged.

6. Nothing in this section shall prevent the use of presentence investigations or commitments under sections 557.026 and 557.031, RSMo.

7. At the sentencing hearing both the state and the defendant shall be permitted to present additional information bearing on the issue of sentence.

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(8)

No. 92-1500

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

PAUL CASPARI, , SUPERINTENDENT OF THE MISSOURI EASTERN CORRECTIONAL CENTER, AND JEREMIAH W. (JAY) NIXON, ATTORNEY GENERAL OF MISSOURI ..... *Petitioners*

VS.

CHRISTOPHER BOHLEN ..... *Respondent*

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE AMICI CURIAE THE STATES OF ARKANSAS, CONNECTICUT, DELAWARE, IDAHO, MISSISSIPPI, MONTANA, NEBRASKA, NEVADA, NEW JERSEY, SOUTH CAROLINA, AND WYOMING IN SUPPORT OF PAUL CASPARI, SUPERINTENDENT OF THE MISSOURI EASTERN CORRECTIONAL CENTER, AND JEREMIAH W. (JAY) NIXON, ATTORNEY GENERAL OF MISSOURI

WINSTON BRYANT
Attorney General of Arkansas

BY: CLINT MILLER
Senior Assistant Attorney General
and KYLE R. WILSON
Assistant Attorney General
200 TOWER BUILDING
323 CENTER STREET
LITTLE ROCK, ARKANSAS 72201
(501) 682-3657

Attorneys for Amici

JOHN M. BAILEY
Chief State's Attorney
STATE OF CONNECTICUT
340 QUINNIPIAC STREET
WALLINGFORD, CT 06492
(203) 265-2373

CHARLES M. OBERLY, III
Attorney General of Delaware
DEPT. OF JUSTICE
820 N. FRENCH STREET
WILMINGTON, DE 19801
(302) 577-2500

LARRY ECHOHAWK
Attorney General
STATE OF IDAHO
STATE HOUSE
BOISE, ID 83720
(208) 334-2400

MIKE MOORE
Attorney General of Mississippi
P.O. BOX 220
JACKSON, MS 39205
(601) 359-3680

JOSEPH P. MAZUREK
Attorney General of Montana
215 N. SANDERS
HELENA, MT 59620
(406) 444-2026

DON STENBERG
Attorney General of Nebraska
STATE CAPITOL
P.O. BOX 98920
LINCOLN, NE 68509
(402) 471-2682

FRANKIE SUE DEL PAPA
Attorney General of Nevada
HEROES' MEMORIAL BLDG.
CAPITOL COMPLEX
CARSON CITY, NV 89710
(702) 687-3510

CAROL HENDERSON
Deputy Attorney General
DIV. OF CRIMINAL JUSTICE
APPELLATE BUREAU
CN 086
25 MARKET STREET
TRENTON, NJ 08625
(609) 984-4804

T. TRAVIS MEDLOCK
Attorney General of South Carolina
P.O. BOX 11549
COLUMBIA, SC 29211
(803) 734-3970

JOSEPH B. MEYER
Attorney General of Wyoming
123 STATE CAPITOL
CHEYENNE, WY 82002
(307) 777-7841

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STATEMENT OF THE INTEREST OF THE AMICI CURIAE

Amici curiae are states with capital punishment statutes and/or statutes that set forth the procedure to be followed in sentencing habitual or persistent offenders. Amici support the position of the petitioners, Paul Caspari, Superintendent of the Missouri Eastern Correctional Center, and Jeremiah

W. (Jay) Nixon, Attorney General of Missouri, regarding whether this Court's decision in *Bullington v. Missouri*, 451 U.S. 430 (1981), was correctly decided. In *Bullington*, the Court applied the Fifth and Fourteenth Amendments' Double Jeopardy Clause to death penalty sentencing procedure. Amici contend that *Bullington* was incorrectly decided and that this Court should use the instant case to reconsider whether the Double Jeopardy Clause applies to capital sentencing decisions. In the alternative, the amici contend that this Court should limit its holding in *Bullington* to death penalty cases involving statutory sentencing procedures identical to those at issue in *Bullington*.

In the decision below, *Bohlen v. Caspari*, 979 F.2d 109 (8th Cir. 1992), the United States Court of Appeals for the Eighth Circuit relied on *Bullington* in applying the Double Jeopardy Clause to a sentencing decision in a non-capital case. The sentencing issue in *Bohlen* was whether respondent Bohlen was subject to, on retrial after remand, an enhanced sentence as a persistent offender after having successfully attacked on direct appeal the sufficiency of the State's proof of his status as a persistent offender at his initial trial. If this Court uses the instant case as a vehicle to extend its holding in *Bullington* to successive non-capital sentencing enhancement proceedings, then the amici and other states that have non-capital sentence enhancement procedure similar to the capital sentence proceedings in *Bullington* will be prohibited by former jeopardy principles from seeking enhancement of an habitual offender's sentence on remand after reversal of the defendant's sentence on the basis that the state failed to prove beyond a reasonable doubt the defendant's status as an habitual or persistent offender.

Prior to this Court's decision in *Bullington* this Court

never applied the Double Jeopardy Clause to sentencing in criminal cases. The amici contend that the values the Double Jeopardy Clause protects are not infringed by permitting successive sentencing proceedings. Therefore, if this Court's decision in *Bullington* is not reversed, the amici will continue to be barred in criminal cases by the Fifth and Fourteenth Amendments' Double Jeopardy Clause from seeking a death sentence or an enhanced sentence at retrial on remand after the defendant wins a post-conviction attack on the sufficiency of the state's proof of his status as an habitual offender or on the sufficiency of the state's proof that the defendant merits a death sentence.

SUMMARY OF ARGUMENT

With regard to whether this Court should affirm the decision of the United States Eighth Circuit Court of Appeals in *Bohlen v. Caspari*, 979 F.2d 109 (8th Cir. 1992) and thereby expand this Court's former jeopardy holding in *Bullington v. Missouri*, 451 U.S. 430 (1981), to cover non-capital sentencing procedure for habitual or persistent offenders, the amici respectfully submit that this Court should not do so. This Court should not do so because such an expansion of the ambit of the Double Jeopardy Clause will operate to the long-term detriment of defendants charged with being habitual or persistent offenders in those states where, by operation of statute, the state must prove the defendant's status as an habitual offender by proof beyond a reasonable doubt. Such proof, nor any other burden of proof, is not required by the Fourteenth Amendment's Due Process Clause. *See McMillan v. Pennsylvania*, 477 U.S. 79, 91-3 (1986).

That some state statutes require the state to prove a defendant's status as an habitual offender beyond a reasonable doubt is a benefit to such defendants because proof beyond a reasonable doubt is the highest standard of proof imposed on the state in a criminal case. This standard protects accused habitual offenders at trial and on retrial. States that confer this statutory benefit on defendants will withdraw it if this Court expands the ambit of the Double Jeopardy Clause to non-capital sentence enhancement procedures. States that require, by statute, the state to prove a defendant's status as an habitual offender by proof beyond a reasonable doubt will amend these statutes in order to impose a lower burden of proof, or no burden of proof at all, and thereby escape the Double Jeopardy bar to the resentencing of habitual offenders

who succeed in post-conviction attacks on the sufficiency of the state's proof at their initial trials of their status as an habitual offender. *Cf. Tibbs v. Florida*, 457 U.S. 31, 45 n.22 (1982). State lawmakers will react to this Court's expansion of the Double Jeopardy Clause by making the statutory amendments, noted above, in order to protect ". . . the public interest in insuring that justice is meted out to offenders." *United States v. Scott*, 437 U.S. 82, 92 (1978). What the Fourteenth Amendment's Due Process Clause does not demand of the states in habitual offender sentencing — proof of the defendant's status beyond a reasonable doubt — the states will not give away to the Fifth and Fourteenth Amendments' Double Jeopardy Clause.

As to whether this Court should overrule its holding in *Bullington*, amici respectfully submit that the Double Jeopardy Clause was incorrectly applied to capital sentencing proceedings in *Bullington* for several reasons. First, the applicability of the Double Jeopardy Clause should not depend on the procedures employed in sentencing. The majority of this Court in *Bullington* applied the Double Jeopardy Clause to capital sentencing proceedings in part because the statutory characteristics of a capital sentencing proceeding resembled the guilt/innocence phase of a criminal trial. However, this Court has repeatedly held that the possibility of a higher sentence is a legitimate concomitant of the retrial process in non-capital proceedings. Given the number and magnitude of substantive and procedural safeguards mandated by the Eighth and Fourteenth Amendments, the sentence of death should not be treated differently for former jeopardy purposes than any other statutorily authorized sentence.

Second, the applicability of the Double Jeopardy Clause should not turn on the procedures employed in sentencing

because the individual states are constitutionally permitted to enact unique procedures governing capital sentencing proceedings. The Double Jeopardy Clause should receive an equally flexible application with regard to sentencing in death penalty cases.

Third, even if the applicability of the Double Jeopardy Clause turns on the specifics of the procedures employed, the mere presence of uniform standards or factors, such as aggravating and mitigating circumstances and the statutorily mandated weighing process, should not be dispositive of the issue. The mere presence of standards employed to channel the jury's discretion should not in and of themselves trigger the application of the Double Jeopardy Clause.

Finally, a jury's refusal to impose a death sentence does not necessarily indicate a failure of the state's proof. In *Bullington*, the jury was instructed that it had the discretion to reject a death sentence even if it found an existence of overwhelming aggravating circumstances which outweighed all evidence offered in mitigation and justified a sentence of death. This sentencing option negates the *Bullington* majority's reasoning that the jury's selection of a life sentence proves that the state failed to put before the jury sufficient evidence to warrant a death sentence. There are situations when the majority opinion in *Bullington* would prohibit resentencing when there was no failure of the state's proof that the defendant deserved a death sentence.

While a sentence of death is irrevocable, it should be no different than any other sentence in the context of the Double Jeopardy Clause. The States should not be precluded from seeking a sentence of death on retrial when the penalty phase of the first trial resulted in a life sentence or a death sentence that was reversed on appeal or in a post-conviction proceeding for lack of sufficient evidence.

ARGUMENT

I.

WHETHER THE DOUBLE JEOPARDY CLAUSE, WHICH PROHIBITS THE STATE FROM SUBJECTING A DEFENDANT TO SUCCESSIVE CAPITAL SENTENCING PROCEEDINGS, SHOULD APPLY TO SUCCESSIVE NON-CAPITAL SENTENCE ENHANCEMENT PROCEEDINGS.

Amici respectfully submit that this Court should limit its holding in *Bullington v. Missouri*, 451 U.S. 430 (1981) to cases involving the death penalty. Amici respectfully request that this Court use the instant case as the opportunity to hold that *Bullington* does not obtain in cases where the death penalty is not involved. Amici respectfully submit that non-capital sentencing enhancement proceedings should, for former jeopardy purposes, be governed by this Court's holding in *North Carolina v. Pearce*, 395 U.S. 711 (1969) and its progeny. In *North Carolina v. Pearce* this Court held, in essence, that the Fifth and Fourteenth Amendments' Double Jeopardy Clause does not prohibit a defendant from receiving on retrial an enhanced sentence of imprisonment that is greater than the enhanced sentence the defendant received at his initial trial.

In support of their assertion that *North Carolina v. Pearce* and its progeny should obtain in non-capital sentence enhancement proceedings where the state is resentencing an accused habitual offender after he has successfully attacked the sufficiency of the state's proof of his status as an habitual offender on appeal or in a post-conviction proceeding, the amici contend that this Court should not expand the scope of the Double Jeopardy Clause, as the Eighth Circuit Court of

Appeals did in the instant case, lest such an expansion of former jeopardy principles operate to the long term disadvantage of accused habitual offenders in criminal cases. This sort of prudential reason for restricting the reach of the Double Jeopardy Clause has been recognized by this Court in one of its former jeopardy precedents, *Tibbs v. Florida*, 457 U.S. 31 (1982). In *Tibbs*, this Court declined to expand the scope of the prohibitions embodied in the Double Jeopardy Clause, in part, because of a fear that such an expansion would operate to the long term detriment of defendants in criminal cases.

In *Tibbs v. Florida*, this Court held that the Double Jeopardy Clause does not bar retrial of a defendant in a criminal case after the defendant's initial conviction is set aside by a state appellate court on the ground that the guilty verdict returned against the defendant in his initial trial was against the weight of the evidence. In the course of this Court's analysis of this issue, this Court set forth a public policy rationale in support of its conclusion. In essence, this public policy rationale amounted to this Court's recognition that state lawmakers might not be inclined to give defendants the benefit of obtaining a new trial on the basis of an "against the weight of the evidence" argument on appeal if the consequence of a successful such argument by a defendant was a former jeopardy-based prohibition to the defendant's retrial. This Court stated its point in this regard as follows:

> We note that a contrary rule, one precluding retrial whenever an appellate court rests reversal on evidentiary weight, might prompt state legislatures simply to forbid those courts to reweigh the evidence. Rulemakers willing to permit a new trial in the face of a verdict supported by legally sufficient evidence may be less willing to free completely a defendant convicted by a jury of his peers. Acceptance of Tibbs' double jeopardy theory might also lead to restrictions on the authority of trial judges to order new trials based on their independent assessment of evidentiary weight. Although Tibbs limits his argument to appellate reversals, his contentions logically apply to a trial judge's finding that a conviction was against the weight of the evidence. (Citations omitted) Endorsement of Tibbs' theory, therefore, might only serve to eliminate practices that help shield defendants from unjust convictions.

Tibbs, 457 U.S. at 45 n.22.

The instant case generally resembles *Tibbs v. Florida* in that in *Tibbs* and in the instant case this Court is being asked to extend the reach of the Double Jeopardy Clause into an area of state statutory criminal procedure where this Court has never before explicitly stated that former jeopardy principles apply. The amici respectfully submit that this Court should apply the public policy rationale, noted above, in *Tibbs v. Florida* to the instant case, given that Missouri's non-capital sentence enhancement procedure, and that of other states, employs a specific feature that works to the defendant's benefit that is not required by Fourteenth Amendment's Due Process Clause. This statutory feature of Missouri's non-capital sentence enhancement procedure, which is shared by other states' non-capital sentencing procedures, is the statutory requirement that the State prove the defendant's status as an habitual or persistent offender by proof beyond a reasonable doubt.[1] The Fourteenth Amendment's due process

[1] *By statute, Missouri requires itself to prove a defendant's status as a persistent offender beyond a reasonable doubt. Mo. Rev. Stat.* § 558.021(1)(2) (1986). Other states have the same statutory requirement for proof of a defendant's status as an habitual or persistent offender by

requirement of proof beyond a reasonable doubt does not apply (nor does any lesser burden of proof) to the factors that a state chooses to require itself, by statute, to prove in order to establish a defendant's status as an habitual or persistent offender. *See McMillan v. Pennsylvania*, 477 U.S. 79, 91-3 (1986); *see also* Model Penal Code § 7.07 at 293-98 (Off. Draft 1985); *see generally* Annotation, *Rule of Reasonable Doubt as Applicable to Proof of Previous Conviction for Purpose of Enhancing Punishment*, 79 A.L.R. 1337 (1932).

Of course, the fact that the legislature in Missouri and the legislatures in other states have chosen to impose on their respective states the burden of proving a defendant's status as an habitual offender by proof beyond a reasonable doubt benefits defendants charged with being habitual or persistent offenders. This statutory requirement benefits such defendants at trial and on retrial. The amici submit that this particular statutory requirement — proof of the defendant's status as an habitual offender beyond a reasonable doubt — is of greater benefit to defendants in criminal cases than the statutory procedure at issue in *Tibbs v. Florida* — the ability of an appellate court to reverse a criminal conviction on the basis that the verdict was against the weight of the evidence — because proof beyond a reasonable doubt is a much more difficult standard for a state to satisfy than the lower standard of proof by the weight of the evidence.

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[1]Continued

proof beyond a reasonable doubt. *See, e.g.*, Ark. Code Ann. § 5-4-504(a) (1987) (Arkansas); Colo. Rev. Stat. Ann. § 16-13-103(4)(b) (West repl. 1986) (Colorado); Ind. Code Ann. § 35-38-1-2(c)(2) (West Cum. Supp. 1992) (Indiana); Md. Code Ann. Crim. Law art. 27, § 643B(d) (1987) (Maryland); Mich. Stat. Ann. § 28.1085 (Callaghan 1986 rev. vol.) (Michigan); and Tenn. Code Ann. § 40-35-108(c) (1990) (Tennessee); *see also* Arthur Campbell, Law of Sentencing § 7:5 n.24 (2d ed. 1991).

The amici submit that just as expansion of the reach of the Double Jeopardy Clause to cover an appellate court's estimate of the weight of the evidence might cause lawmakers to prohibit appellate courts from making such estimates, (*Tibbs*, 457 U.S. at 45 n.22), the expansion of the ambit of the Double Jeopardy Clause, as the Eighth Circuit Court of Appeals did in the instant case, to the state-imposed statutory requirement of proof of a defendant's status as an habitual or persistent offender beyond a reasonable doubt might cause state lawmakers to react by lowering this statutory requirement to the level permitted by this Court's interpretation of the Fourteenth Amendment's Due Process Clause, which, at most, is proof by a preponderance of the evidence. *See McMillan v. Pennsylvania*, 477 U.S. at 91-3.

State lawmakers might well amend their non-capital sentence enhancement proceedings to lessen or to remove altogether the burden of proof on the state if this Court uses the instant case as the vehicle to expand the reach of the Double Jeopardy Clause by extending its holding in *Bullington v. Missouri* to such sentencing proceedings. State lawmakers might well make such amendments in their non-capital sentence enhancement procedure once they realize that if they amend their sentence enhancement procedure by lessening or removing the states' burden of proof, the states will escape the reach of the Double Jeopardy Clause and will be able to punish an accused habitual offender on retrial if the offender succeeds in persuading a court on direct appeal or in a post-conviction proceeding that the state had failed at the defendant's initial trial to prove his status as an habitual offender. Such statutory amendments by state lawmakers would remove non-capital sentence enhancement procedures from the ambit of the Double Jeopardy Clause because the presence of the requirement of proof beyond a reasonable

doubt was identified by the majority of this Court in *Bullington v. Missouri* as the key factor that placed the sentencing procedure at issue there within the ambit of the Double Jeopardy Clause. *Bullington*, 451 U.S. at 438, 441, 445-46. *Accord State v. Hennings*, 670 P.2d 256, 260 (Wash. 1983); *cf.* Wash. Rev. Code § 9.94A.030(12)(a); § 9.94A.110 (1992 rev. code).

One could hardly be surprised if state lawmakers react in the manner just described in order to vindicate the public interest in seeing that the guilty are punished. This public interest has been previously recognized by this Court as a factor to be considered in former jeopardy jurisprudence. *See, e.g., United States v. Scott*, 437 U.S. 82, 92 (1978) (". . . the public interest in insuring that justice is meted out to offenders.") and *Burks v. United States*, 437 U.S. 1, 15 (1978) (". . . society maintains a valid concern for insuring that the guilty are punished.") To be sure, state legislatures are not composed of criminal law scholars but state lawmakers will, if this Court expands the scope of the Double Jeopardy Clause in the instant case by affirming the decision of the United States Eighth Circuit Court of Appeals, quickly see that a state can avoid the prohibitions contained in the Double Jeopardy Clause with regard to non-capital sentence enhancement procedure by lowering or removing the burden of proof that the State imposes on itself by statute. Doubtlessly, the states will not give away to the Fifth and Fourteenth Amendments' Double Jeopardy Clause that which — proof of a criminal defendant's status as an habitual offender by proof beyond a reasonable doubt — is not demanded by the Fourteenth Amendment's Due Process Clause.

II.

WHETHER THIS COURT'S DECISION IN BULLINGTON V. MISSOURI, 451 U.S. 430 (1982) EXPANDS THE PROTECTION AFFORDED BY THE DOUBLE JEOPARDY CLAUSE CONTRARY TO THE ORIGINAL INTENT OF THE CLAUSE AS ARTICULATED BY THE TERMS OF THE CONSTITUTION AND BEYOND THE TRADITIONAL PROTECTION OF THE CLAUSE.

The amici agree with and adopt the petitioners' argument that this Court's decision in *Bullington v. Missouri*, 451 U.S. 430 (1981) expands the protection afforded by the Double Jeopardy Clause contrary to the original intent of the Clause as articulated by the framers of the Constitution and beyond the traditional protections of the Clause. For the reasons discussed herein, the amici respectfully submit that this Court should overrule the majority opinion in *Bullington*.

First, the applicability of the Double Jeopardy Clause should not depend upon the procedures employed in sentencing. As the petitioners correctly note, Justice Powell, in his dissent from the majority opinion in *Bullington* stated that any distinction between the Missouri capital sentencing scheme and those employed in *United States v. DiFrancesco*, 449 U.S. 117 (1980); *Chaffin v. Stynchcombe*, 412 U.S. 17 (1973); *North Carolina v. Pearce*, 395 U.S. 711 (1969); and *Stroud v. United States*, 251 U.S. 15 (1919), the leading opinions which hold that the imposition of a greater sentence upon retrial is constitutionally permissible, are "immaterial for purposes of the Double Jeopardy Clause." *Bullington v. Missouri*, 451 U.S. at 448 n.2 (Powell, J., dissenting). The amici contend that Justice Powell was correct.[2]

[2]Justice Powell was joined in his dissent by Chief Justice Burger, Justice White, and Justice Rehnquist.

In deciding the applicability of the Double Jeopardy Clause, the statutory characteristics of the sentencing proceeding or its resemblance to the guilt/innocence phase of a capital murder trial should not be the controlling factors of such an inquiry. Rather, as the dissent in *Bullington* correctly noted, "the question is whether the *reasons* for considering an acquittal on guilt or innocence as absolutely final apply equally to a sentencing decision imposing less than the most severe sentence authorized by law." *Id.* at 450. However, the traditional "reasons" or principles underlying the Double Jeopardy Clause, i.e., the enhanced possibility of conviction, and the repeated and prolonged anxiety placed upon the defendant, are not valid concerns in either the capital or non-capital sentencing contexts. Indeed, this Court has held that "[t]he possibility of a higher sentence [has been] recognized and accepted as a legitimate concomitant of the retrial process." *Id.* at 451 [quoting *Chaffin v. Stynchcombe*, 412 U.S. 17, 25 (1973)]. The dissent interpreted this prior ruling to mean that "[t]he possibility of a higher sentence is acceptable under the Double Jeopardy Clause, whereas the possibility of error as to guilt or innocence is not, because the second jury's sentencing decision is as 'correct' as the first jury's." *Id.*

It is clear that such an occurrence does not violate the Double Jeopardy Clause in the non-capital context. *North Carolina v. Pearce*, 395 U.S. 711 (1969); *Moon v. Maryland*, 398 U.S. 319 (1970); *North Carolina v. Rice*, 404 U.S. 244 (1971); *Colten v. Kentucky*, 407 U.S. 104 (1972); *United States v. DiFrancesco*, 449 U.S. 117 (1980). Given the number and magnitude of substantive and procedural safeguards, which this Court has determined are mandated by the Eighth and Fourteenth Amendments, the sentence of death should not be treated differently than any other statutorily author-

ized sentence. *Furman v. Georgia*, 408 U.S. 238 (1972); *Gregg v. Georgia*, 428 U.S. 153 (1976); *Profitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Enmund v. Florida*, 458 U.S. 782 (1982); *Caldwell v. Mississippi*, 472 U.S. 320 (1985); *Skipper v. South Carolina*, 476 U.S. 1 (1986); *Penry v. Lynaugh*, 492 U.S. 302 (1989); *McCoy v. North Carolina*, 494 U.S. 433 (1990); *Lankford v. Idaho*, 500 U.S. ___, 111 S.Ct. 1723 (1991); and *Dawson v. Delaware*, 503 U.S. ___, 112 S.Ct. 1093 (1992). Correspondingly, the possibility of receiving the sentence of death upon retrial after a previous sentence of life without parole should be as with any other sentence — a "legitimate concomitant of the retrial process." *Bullington v. Missouri*, 451 U.S. at 451 [quoting *Chaffin v. Stynchcombe*, 412 U.S. 17, 25 (1973)] (Powell, J. dissenting).

Second, the above argument is bolstered by the fact that individual States are indeed constitutionally permitted to enact procedures substantially and sometimes radically different from those employed in *Bullington*. *See Graham v. Collins*, ___ U.S. ___, 113 S.Ct. 892 (1993); *see also Lowenfield v. Phelps*, 484 U.S. 231 (1988). Given the number of varying procedures which are constitutionally permitted, the petitioners correctly note that the application of the Double Jeopardy Clause should not turn solely upon the procedures employed by the individual states. The Double Jeopardy Clause should be given a more universal and comprehensive application unobscured by numerous piecemeal exceptions and qualifications.

Third, even if the focus of an inquiry as to the applicability of the Double Jeopardy Clause to the sentencing phase of a capital murder trial should center upon the specifics of the procedure employed and its statutory resemblance

to the guilt/innocence phase, the mere presence of uniform standards or factors, such as aggravating and mitigating circumstances and the statutorily mandated weighing process, should not, in and of themselves, be dispositive of the issue. As the majority correctly noted, the procedure employed in *United States v. DiFrancesco*, 449 U.S. 117 (1980) required a specific showing of additional factors aimed at proving the defendant was a "dangerous special offender." *Bullington*, 451 U.S. at 440-41. Regardless of the distinction drawn by the majority, it is clear that the mere presence of standards employed to channel the jury's discretion do not in and of themselves invoke the protection of the Double Jeopardy Clause. They should have no more significance in the capital sentencing context.

The same is true of the other constitutionally required limitations which are placed upon the capital sentencing jury's discretion. Should the applicability of the Double Jeopardy Clause truly turn upon the number of choices offered to the jury? It is clear that society mandates few punishments it considers appropriate to recompense an offense as serious as capital murder. Simply put, a wide range of possible sentences is neither available nor appropriate in the context of a capital offense. The mere fact that the capital sentencing jury is faced with fewer choices than its non-capital counterpart should be of no significance.

Finally, with regard to the jury's limited discretion, the *Bullington* dissent correctly noted that a sentence of life does not always indicate a failure of proof upon the part of the State. For example, the jury in *Bullington* was specifically instructed that it had the unfettered discretion to reject a death sentence even if it found the existence of overwhelming aggravating circumstances which outweighed all evidence offered in mitigation and justified a sentence of death.

Bullington v. Missouri, 451 U.S. at 434-435. This factor, alone, undermines the majority's reasoning that the jury's imposition of a life sentence necessarily implies that the State failed to introduce sufficient evidence to support a sentence of death. Therefore, the majority's total reliance upon the sufficiency of the evidence exception established in *Burks v. United States*, 437 U.S. 1 (1978) is misplaced, at least when applied on a wholesale basis with no articulated exceptions. Even when there is no failure upon the State's part with regard to its evidentiary burden, the majority opinion in *Bullington* prohibits resentencing. The majority's reasoning does not account for this situation nor does it allow for the number of possible variations of procedure noted above. The petitioners properly contend that the majority opinion in *Bullington* stretches the limit of the Double Jeopardy Clause too far.

The amici agree with the petitioners' contention that, while a sentence of death is certainly severe and non-reversible, and, correspondingly, deserving of numerous constitutional protections, it should be no different than any other sentence in the context of the Double Jeopardy Clause. A defendant facing retrial with the possibility of life or a large number of consecutive sentences for multiple terms of years is, for all practical purposes, in the same position as the defendant facing death. While there are numerous differences, both philosophically and procedurally, as a base consideration, a multiple offender defendant facing the possibility of, for example, 150 years in prison is no different than the defendant facing death. *See generally* Jacques Barzun, *In Favor of Capital Punishment, in* The Death Penalty in America 154-65 (Hugo Adam Bedau ed., 1964). The only difference is the timing. Each will spend the remainder of his life in prison. There is no reason the non-capital defendant should be treated differently. Pursuant to the long established

line of cases preceding *Bullington*, the defendant facing 150 years can be retried and receive the same, or if possible, a greater sentence without any violation of the Double Jeopardy Clause. There should, likewise, be no violation when the capital defendant receives a greater sentence upon retrial. As a practical matter, should the capital defendant who receives a life sentence be afforded greater protection than the non-capital defendant who receives multiple life terms? Should the procedural aspects of the capital sentencing procedure truly be sufficient justification for such a disparity? The amici contend that they should not.

CONCLUSION

The amici adopt and agree with the petitioners' arguments and respectfully suggest that this Court overrule its holding in *Bullington v. Missouri*, 451 U.S. 430 (1981) or, in the alternative, limit its holding in *Bullington* to death penalty cases.

Respectfully submitted,

WINSTON BRYANT
Attorney General of Arkansas

BY: CLINT MILLER
Senior Assistant Attorney General
and KYLE R. WILSON
Assistant Attorney General
200 TOWER BUILDING
323 CENTER STREET
LITTLE ROCK, ARKANSAS 72201
(501) 682-3657

Attorneys for Amici

No. 92-1500

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

PAUL CASPARI, Superintendent of the Missouri Eastern Correctional Center, and JEREMIAH (JAY) NIXON, Attorney General of Missouri,

Petitioners,

v.

CHRISTOPHER BOHLEN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF AMICUS CURIAE COOK COUNTY STATE'S ATTORNEY'S OFFICE IN SUPPORT OF PETITIONERS, PAUL CASPARI, SUPERINTENDENT OF THE MISSOURI EASTERN CORRECTIONAL CENTER, AND JEREMIAH (JAY) NIXON, ATTORNEY GENERAL OF MISSOURI

JACK O'MALLEY
State's Attorney, County of Cook
309 Richard J. Daley Center
Chicago, Illinois 60602
(312) 443-5496
Attorney for Amicus Curiae

RENEE G. GOLDFARB
THEODORE FOTIOS BURTZOS
WILLIAM D. CARROLL
SUSAN R. SCHIERL
Assistant State's Attorneys
Of Counsel

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

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INTEREST OF AMICUS CURIAE

Amicus curiae, the Cook County State's Attorney's Office, is an entity responsible for a vast amount of criminal prosecutions in the State of Illinois. The State of Illinois has enacted various noncapital sentencing schemes comparable to the noncapital sentencing scheme at issue in

the instant appeal. With this cause, this Court is asked to decide whether the double jeopardy principles enunciated in *Bullington v. Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981) should be extended into the realm of noncapital sentencing. Thus, the Amicus has a compelling interest in the outcome of this appeal due to the impact it may have upon criminal prosecutions in Cook County, Illinois.

Moreover, the petitioners and the several States submitting an Amici curiae brief in this cause attack the propriety of this Court's decision in *Bullington* itself. With this position the instant Amicus concurs and hereby adopts the arguments on this point set forth in the petitioners' and Amici's briefs. Thus, for this reason also, the Amicus submits that its interest in the outcome of the instant appeal is compelling.

SUMMARY OF ARGUMENT

With *Bullington v. Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), this Court carved an extremely narrow exception to the firmly rooted general rule that the Double Jeopardy Clause does not operate to bar the imposition of a higher sentence upon remand. *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed. 2d 656 (1969); *United States v. DiFrancesco*, 449 U.S. 117, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980). The "*Bullington* exception," however, is limited to the capital sentencing arena. This Court itself, in *Lockhart v. Nelson*, 488 U.S. 33, 37, n. 6, 109 S.Ct. 285, 289, n. 6, 102 L.Ed.2d 265 (1988), has expressly left open the question of whether

the principles of double jeopardy should be further extended to operate within the realm of noncapital sentencing proceedings. The Eighth Circuit Court of Appeals erroneously found that, "[a]fter *Bullington*, it is a short step to apply the same double jeopardy protection to a noncapital sentencing hearing as [this Court] applied to a capital sentence enhancement hearing." *Bohlen v. Caspari*, 979 F.2d 109, 113 (8th Cir. 1992). Rather, double jeopardy jurisprudence, logic and sound public policy teach that this "short step" is a quantum leap that should not be taken.

The jurisprudence of this Court teaches that convictions and acquittals receive far different treatment than sentences under the Double Jeopardy Clause. Prior to *Bullington*, the double jeopardy bar operated in the context of sentencing solely to prevent "multiple punishment." *Pearce*, 395 U.S. at 717; *DiFrancesco*, 449 U.S. at 137-138. However, in 1981, with *Bullington*, this Court extended the type of double jeopardy protection to capital sentencing which theretofore had only been applicable in the conviction/acquittal context: the "implied acquittal/lesser included offense" concept. In *Bullington*, this Court treated the imposition of a life sentence as a "lesser included offense" of the death penalty (*See Green v. United States*, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957)), a double jeopardy notion that this Court had declined to employ in the noncapital sentencing context only one year earlier in *DiFrancesco*. The elemental distinction between these two cases is the fact that *Bullington* dealt with a capital sentencing scheme while *DiFrancesco* dealt with a noncapital sentencing scheme. Thus, *Bullington* represents a policy decision on the part of this Court to extend double jeopardy protections to capital offenders that are not extended to noncapital offenders.

This "disparate treatment" given to capital offenders is not new in this Court's jurisprudence. For example, this Court flatly refused to extend to noncapital sentencing proceedings the Eighth Amendment proportionality review operative in the context of capital sentencing proceedings solely because of "the unique nature of the death penalty." *Rummel v. Estelle*, 445 U.S. 263, 273, 100 S.Ct. 1133, 1138, 63 L.Ed.2d 382 (1980). So too, in the double jeopardy context, the qualitative and quantitative difference between death and all other noncapital sentences explains why the protection afforded capital offenders in *Bullington* should not be extended to noncapital offenders.

Moreover, the analogy utilized in *Bullington* only operates logically within a capital sentencing scheme and breaks down if forced into the noncapital sentencing arena. With *Bullington*, this Court analogized the imposition of a life sentence to a "lesser included offense" of the death penalty. This perfect fit can be found only in the context of capital sentencing. With noncapital sentencing schemes, e.g., the enhanced sentencing scheme at issue in the instant cause, the sentencing alternatives are many: either defendant receives the enhanced sentence or his sentence is one within a range of sentences. Thus, the very analogy by which this Court engrafted double jeopardy protections afforded at trial onto a capital sentencing scheme cannot be the same vehicle by which these protections are transferred to the noncapital sentencing arena.

Finally, the policy implications of extending the *Bullington* double jeopardy protections to noncapital sentencing are alarming. To date, there is a clear line of demarcation between capital and noncapital sentencing in terms of double jeopardy. Thus, there exists a uniform administration of this aspect of the Constitution throughout the nation. Application of *Bullington* to noncapital sentencing proceedings could obtain varying results from State to State, depending on the degree of similarity the particular sentencing scheme bears to the scheme at issue in *Bullington*. Moreover, a State could very easily manipulate its noncapital sentencing schemes, to the detriment of its noncapital offenders. In order to circumvent the application of double jeopardy principles, a State need only eliminate certain substantive and procedural protections currently afforded its noncapital offenders. Because the State need not be placed in this "catch 22" and because constitutional protections should be extended uniformly, a clear line of demarcation between capital and noncapital sentencing schemes should be drawn by this Court in the context of the Double Jeopardy Clause. Should this Court not accept the invitation to reassess the propriety of *Bullington* itself, this Court should limit the application of *Bullington* to the capital sentencing arena.

ARGUMENT

WHETHER DOUBLE JEOPARDY PROTECTIONS AFFORDED AT CAPITAL SENTENCING PROCEEDINGS SHOULD BE EXTENDED INTO THE NONCAPITAL SENTENCING ARENA.

This Court must now decide whether the double jeopardy bar operative in the capital sentencing context (*See Bullington v. Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed. 2d 270 (1981)) should be also extended to the noncapital sentencing arena. This Court's jurisprudence teaches that, at the very least, double jeopardy protections are parceled out differently between the sentencing and trial context. With *Bullington*, for the first time, this Court engrafted

the trial-type concept of lesser included offenses onto a capital sentencing scheme. The Eighth Circuit Court of Appeals, in the instant cause, has erroneously extended this notion to a noncapital sentencing scheme.

"Jeopardy denotes risk. In the constitutional sense, jeopardy describes the risk that is traditionally associated with a criminal prosecution." *Breed v. Jones*, 421 U.S. 519, 528, 95 S.Ct. 1779, 1785, 44 L.Ed.2d 346 (1975). The prohibition against multiple trials has been said to be the "controlling constitutional principle." *United States v. Wilson*, 420 U.S. 332, 346, 95 S.Ct. 1013, 1023, 43 L.Ed.2d 232 (1975). This is bottomed in the primary purpose of the Clause, which is to preserve the finality of judgments. *Crist v. Bretz*, 437 U.S. 28, 33, 98 S.Ct. 2156, 2159, 57 L.Ed.2d 24 (1978). Generally, however, sentences do "not have the qualities of constitutional finality that attend an acquittal." *United States v. DiFrancesco*, 449 U.S. 117, 133, 101 S.Ct. 426, 433, 66 L.Ed.2d 328 (1980). Prior to *Bullington*, the only double jeopardy protection afforded in the sentencing context was the prohibition against multiple punishments. *See North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969). *Bullington* represents a limited departure from the clear line between sentencing and trial; but, the Eighth Circuit Court of Appeals failed to recognize that this departure is limited solely to capital sentencing.

In *DiFrancesco*, this Court addressed a double jeopardy challenge to the Organized Crime Control Act of 1970, a noncapital sentencing provision. The Act authorized the imposition of an increased sentence upon a convicted "dangerous special offender" and granted the government, under specified conditions, the right to appeal the sentence imposed. *DiFrancesco*, 449 U.S. at 118-120. Necessarily, concomitant with the government's right to appeal is the

right, should the appeal prove successful, to obtain a higher sentence.

Defendant, however, attempted to invoke double jeopardy protection by lifting the double jeopardy principles operative at trial and, for the first time, apply them in the sentencing arena. Defendant *analogized* the imposition of his particular sentence to the conviction of a lesser included offense and the consequent "implied acquittal" of any greater sentence. *DiFrancesco*, 449 U.S. at 133-134. This Court reviewed its pertinent rulings (449 U.S. at 134-136), the history of sentencing practices (449 U.S. at 133-134), and the considerations of double jeopardy policy (449 U.S. 136-137). After analyzing these sources, this Court declined to engraft defendant's trial-based "implied acquittal/lesser included offense" analogy onto the noncapital sentencing scheme. Because of the "fundamental distinctions between a sentence and an acquittal" (449 U.S. at 133), this Court concluded that defendant's sentence was not to be accorded "constitutional finality and conclusiveness similar to that which attaches to a jury's verdict of acquittal." *DiFrancesco*, 449 U.S. at 132. Thus, in *DiFrancesco*, this Court clearly drew a double jeopardy line between sentencing and convictions/acquittals, thereby reaffirming the general rule that the double jeopardy principles operative at trial are not transferable to the sentencing arena.

One year later, however, in 1981, this Court deigned to extend double jeopardy principles to a Missouri *capital* sentencing hearing through the very vehicle earlier rejected in *DiFrancesco*: the "implied acquittal/lesser included offense" analogy. *Bullington v. Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981). This Court recognized the general rule to be that "[t]he imposition

of a particular sentence usually is not regarded as an 'acquittal' of any more severe sentence that could have been imposed." 451 U.S. at 438. Nonetheless, unlike any of the *noncapital* sentencing proceedings previously considered by this Court, the capital sentencing procedure in Missouri "resembled and, indeed, in all relevant respects was like the immediately preceding trial on the issue of guilt or innocence." 451 U.S. at 438. Thus, the extension of trial-type notions of double jeopardy into this sentencing arena was facile.

The framework of the capital sentencing scheme at issue in *Bullington* lent itself perfectly to the very "implied acquittal/lesser included offense" analogy earlier rejected in *DiFrancesco*. The jury was ***explicitly required*** to determine whether the prosecution had "proved its case" that defendant deserved the death penalty. (emphasis in original) 451 U.S. 444. Missouri's capital sentencing provision afforded the jury two, and only two, definite sentencing alternatives: death or a life sentence. 451 U.S. at 432. The jury affirmatively decided to impose the lesser life sentence, which operated as an "implied acquittal" of the greater sentence of death. 451 U.S. 443-445; *See* 451 U.S. at 447-453 (Powell, J., dissenting). Thus, the *Bullington* Court extended trial-type double jeopardy protection to a capital sentencing proceeding by utilizing the very *analogy* it declined to adopt in the *DiFrancesco noncapital* sentencing context.

Subsequent to *Bullington*, this Court has limited its application of the *Bullington* "implied acquittal/lesser included offense" analogy to capital sentencing proceedings. In *Arizona v. Rumsey*, 467 U.S. 203, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984), the sentencing court, in reliance upon an error of law, imposed a life sentence pursuant to Arizona's capital sentencing scheme. The Court determined that the "acquittal" of the death sentence, therefore, was final, despite the fact that it was premised upon legal error. 467 U.S. at 211.

Two years after *Rumsey*, this Court again applied the "implied acquittal/lesser included offense" analogy to a capital sentencing proceeding. *Poland v. Arizona*, 476 U.S. 147, 106 S.Ct. 1749, 90 L.Ed.2d 123 (1986). However, here this Court recognized that the extension of trial-type double jeopardy protections even into the capital sentencing context was logically limited. In *Poland*, the reviewing court found that there was insufficient evidence to support the "especially heinous, cruel or depraved" aggravating factor upon which the imposition of defendants' death sentences were based. The reviewing court, however, found that there was sufficient evidence to support the "pecuniary gain" aggravating factor upon which the sentencing court did not rely. On remand, defendants were again sentenced to death on the basis of, *inter alia*, the pecuniary gain aggravating factor. This Court rejected defendants' argument that the reviewing court's finding of insufficient evidence regarding the "especially heinous, cruel or depraved" aggravating factor constituted an "acquittal" of the death penalty (476 U.S. at 157), reasoning that:

> "*Bullington* indicates that the proper inquiry is whether the sentencer or reviewing court has 'decided that the prosecution has not proved its case' that the death penalty is appropriate. (footnote omitted) We are not prepared to extend *Bullington* further and view the capital sentencing hearing as a set of mini-trials on the existence of each aggravating circumstance. Such an approach would push the analogy on which *Bullington* is based past the breaking point." 476 U.S. at 155-156.

Thus, this Court itself has recognized that the *entire* double jeopardy jurisprudence, developed in the context of a trial, cannot be superimposed upon the framework of even a capital sentencing hearing. The "implied acquittal/lesser included offense" analogy was selectively lifted from its historical foundation in the trial context and forcefully injected into the realm of capital sentencing. This selective use of double jeopardy reflects a sheer policy decision to extend double jeopardy only to capital sentencing.

The double jeopardy jurisprudence of this Court teaches that *Bullington* and its "implied acquittal/lesser included offense" analogy represent a narrowly circumscribed extension of double jeopardy protections to the sentencing context. With *Bullington*, this Court has drawn its line of demarcation at *capital* sentencing. This Court has never extended the *Bullington* "implied acquittal/lesser included offense" analogy to noncapital sentencing proceedings. *See Lockhart v. Nelson*, 488 U.S. 33, 37, n. 6, 109 S.Ct. 285, 289 n. 6, 102 L.Ed.2d 265 (1988) (Because the State of Arkansas conceded the issue, this Court assumed, without deciding, that the *Bullington* analogy extended to noncapital sentencing proceedings.); *Hunt v. New York*, ____ U.S. ____, 112 S.Ct. 432, 116 L.Ed.2d 452 (1991) (White, J., dissenting from the denial of a petition for *certiorari*.) (Dissent makes it clear that the application of double jeopardy to noncapital sentencing proceedings is still an open issue.). Quite simply, noncapital sentencing proceedings do not afford a framework within which the *Bullington* "implied acquittal/lesser included offense" analogy can operate. As Justice Brennan noted in his dissent from the denial of a petition for *certiorari* in *Sorola v. Texas*, 493 U.S. 1005, 110 S.Ct. 569, 107 L.Ed.2d 563 (1989):

> "To be sure, *Bullington* and *Rumsey* relied on the fact that the sentencer had determined after a trial-like hearing that the evidence was insufficient to impose the death penalty * * * * But the significance of the presence of a trial-like proceeding was that it distinguished a capital case from the noncapital sentencing context, where the imposition of a particular sentence is not an implied acquittal of a greater sentence. (citation) The Court justified an exception to the general rule because of the unique features of the capital sentencing scheme where the state bears the burden of proving, often beyond a reasonable doubt, that death is the appropriate penalty." 493 U.S. at 1008.

Application of this "implied acquittal/lesser included offense" analogy to noncapital sentencing proceedings, therefore, would "push the analogy past the breaking point," something this Court declined to do even in the more apt context of capital sentencing.

More importantly, the *Bullington* Court itself made it clear that its use of the "implied acquittal/lesser included offense" analogy served as a vehicle through which to graft traditional double jeopardy principles onto capital sentencing proceedings. This Court took great pains to note that *Bullington* represents a departure from the general rule that double jeopardy protection does not operate in the context of sentencing. The *Bullington* Court justified this departure, in part, on the grounds that capital sentencing shares the same values that underlie the absolute finality accorded a verdict of acquittal on the issue of guilt or innocence. 451 U.S. at 445. The Court stated that:

> "The 'embarrassment, expense and ordeal' and the 'anxiety and insecurity' faced by a defendant at the penalty phase of a Missouri capital murder trial surely are at least equivalent to that faced

> by any defendant at the guilt phase of a criminal trial. The 'unacceptably high risk that the [prosecution], with its superior resources, would wear down a defendant,' (citation) thereby leading to an erroneously imposed death sentence, would exist if the State were to have a further opportunity to convince a jury to impose the ultimate punishment." 451 U.S. at 445.

These values are not present in the noncapital sentencing context. It can hardly be said that the "anxiety and insecurity" inherent in a capital sentencing proceeding is equivalent to that felt by a defendant at a noncapital sentencing hearing. The defendant facing capital sentencing stands convicted of capital murder. "The punishment of death is part and parcel of the substantive offense of capital murder." *See People v. Sailor*, 480 N.E.2d 701 (N.Y. 1985), *cert. denied*, 474 U.S. 982 (1985). Thus, a capital sentencing proceeding integrally involves a redetermination, in the form of aggravating and mitigating factors, of the manner in which the underlying murder was committed. The capital sentencing defendant, thus, has a chance of being "acquitted" of *capital* murder and having his "conviction" reduced to *noncapital* murder should the sentencing body opt not to impose the death sentence. The noncapital sentencing defendant simply is not afforded such an opportunity. The noncapital sentencing hearing depends, in large part, upon straightforward, objective record evidence of a defendant's criminal past such as "rap" sheets, certified copies of conviction, and presentence investigation reports. The noncapital sentencing proceeding is not part and parcel of any substantive offense. Thus, a noncapital sentencing defendant does not feel the "anxiety and insecurity" of being "convicted" or "acquitted" of his substantive offense by the sentencing body.

The policy determination to draw the line of demarcation for extension of double jeopardy protections at capital sentencing proceedings is justifiable because the "imposition of death by public authority is so profoundly different from all other penalties." *Lockett v. Ohio*, 438 U.S. 586, 605, 98 S.Ct. 2954, 2965, 57 L.Ed.2d 973 (1978). This Court has demonstrated its willingness to limit Eighth Amendment proportionality review solely to capital sentencing proceedings based upon the "unique nature of the death penalty." *Rummel v. Estelle*, 445 U.S. 263, 273, 100 S.Ct. 1133, 1138, 63 L.Ed.2d 382 (1980). The *Rummel* Court explained:

> "The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity." 445 U.S. at 263, citing *Furman v. Georgia*, 408 U.S. 238, 306, 92 S.Ct. 2726, 2760, 33 L.Ed.2d 346 (1972).

In *Rummel*, and again in *Harmelin v. Michigan*, 501 U.S. ____, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991), this Court declined to extend the constitutional protection of proportionality review to noncapital sentences. The *Harmelin* Court explained, "Proportionality review is one of several respects in which we have held that 'death is different,' and have imposed protections that the Constitution nowhere else provides." 111 S.Ct. at 2701.

Similarly, with *Bullington*, this Court has afforded special treatment to capital offenders, carving a narrow exception to the general rule, manifested in *DiFrancesco*, that trial-type principles of double jeopardy do not apply to the imposition of sentences. This is so because of the

qualitative and quantitative difference between death and all other noncapital sentences. *See Sawyer v. Whitley*, 945 F.2d 812, 818-819 (5th Cir. 1991), *cert. granted*, 112 S.Ct. 434 (1991). The double jeopardy jurisprudence of this Court teaches that noncapital sentencing proceedings are governed by the *DiFrancesco* general rule and capital sentencing proceedings are governed by *Bullington*. Thus, the Eighth Circuit Court of Appeals' decision to extend *Bullington* to noncapital sentencing proceedings was error. *See Denton v. Duckworth*, 873 F.2d 144 (7th Cir. 1989) *cert. denied*, 493 U.S. 941 (1989), *Linam v. Griffin*, 685 F.2d 369 (10th Cir. 1982), *cert. denied*, 459 U.S. 1211 (1983); *Cf. French v. Estelle*, 692 F.2d 1021 (5th Cir. 1982), *cert. denied*, 461 U.S. 937 (1983).

Moreover, as stated above, the application of constitutional principles should obtain from State to State in a uniform manner. Should this Court decline to reconsider the propriety of *Bullington* itself, a State could very easily manipulate its sentencing schemes to avoid the operation of the Double Jeopardy Clause. Because *Bullington* rests upon an assessment of the substantive and procedural safeguards afforded by the sentencing scheme, to avoid application of *Bullington* double jeopardy principles, a State need only tamper with these safeguards so as to limit its sentencing scheme's likeness to the scheme at issue in *Bullington*. Clearly, this would operate to the detriment of the criminal defendants and places the State itself in the unenviable position of choosing between these safeguards and the Double Jeopardy Clause. For these reasons, extension of *Bullington* to the noncapital sentencing realm amounts to nothing less than bad policy.

As stated above, the Amicus hereby adopts the position of the petitioners and the Amici and requests that this Court reconsider the propriety of *Bullington* itself.

Should this Court decline this invitation, for the foregoing reasons, the Amicus respectfully contends that *Bullington*-type double jeopardy protections should be reserved to capital sentencing and not be extended into the realm of noncapital sentencing.

CONCLUSION

Amicus curiae respectfully requests that this Honorable Court reverse the decision of the Eighth Circuit Court of Appeals.

Respectfully submitted,

JACK O'MALLEY
State's Attorney, County of Cook
309 Richard J. Daley Center
Chicago, Illinois 60602
(312) 443-5496
Attorney for Amicus Curiae

RENEE G. GOLDFARB
THEODORE FOTIOS BURTZOS
WILLIAM D. CARROLL
SUSAN R. SCHIERL
Assistant State's Attorneys
Of Counsel

QUESTIONS PRESENTED

I.

Whether the Double Jeopardy Clause which prohibits the state from subjecting a defendant to successive capital sentencing proceedings should apply to successive non-capital sentence enhancement proceedings.

II.

Whether this Court's decision in Bullington v. Missouri, 451 U.S. 430 (1981) extends the protection afforded by the Double Jeopardy Clause contrary to the original intent of the clause as articulated by the terms of the Constitution and beyond the traditional protection of the clause.

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INTEREST OF AMICUS CURIAE

The National Legal Aid and Defender Association is a national association of appointed counsel in both capital and non-capital criminal cases and civil legal aid corporation attorneys who represent indigent persons in the federal and state courts.

The National Association of Criminal Defense Lawyers is a national association of retained and appointed counsel representing defendants in state and federal court in both capital and non-capital cases. NLADA and NACDL members regularly litigate double jeopardy issues in the trial courts of the United States and the various states.

STATEMENT OF THE CASE

Missouri law requires the state to prove its persistent offender allegations outside the presence of the jury, but

during the jury trial. The record is completely silent as to whether such a hearing occurred in respondent's case. Despite the petitioner's failure to use this window of opportunity, the trial court found respondent to be a persistent offender and removed the sentencing function from the jury.

On appeal, the Missouri Court of Appeals "requested the parties to supplement the record to prove that the prior convictions were presented to the court. No such proof was furnished." State v. Bohlen, 670 S.W.2d 119, 123 (Mo. App. 1984).

Petitioner asks this Court to authorize repeated attempts to prove that Mr. Bohlen is a persistent offender, despite having had several opportunities to prove its charge.

The Eighth Circuit Court of Appeals

granted respondent habeas corpus relief barring petitioner from pursuing its persistent offender allegations. The court, in Bohlen v. Caspari, 979 F.2d 109, 113 (8th Cir. 1992) held that after

> Bullington [v. Missouri, 451 U.S. 430 (1981)], it is a short step to apply the same double jeopardy protection to a non-capital sentencing hearing as the Supreme Court applied to a capital sentence enhancement hearing. The rule is not new.

The court held that retrial of respondent was barred by Burks v. United States, 347 U.S. 1 (1978), because the reversal by the Missouri Court of Appeals was based on insufficiency of the evidence.

ARGUMENT

I.

A.

A federal court cannot reach the merits or grant habeas corpus relief to a state prisoner if the rule to be applied is

new[1] within the meaning of Teague v. Lane, 489 U.S. 288 (1989).[2]

The Court of Appeals carefully conducted a new rule analysis and held that:

> [e]xtending Bullington to non-capital sentencing enhancement hearings is not a sufficient stretch to cause it to be a new rule under Teague. Bohlen v. Caspari, 979 F.2d 109, 115 (8th Cir. 1992).

Amici agree with the analysis set out by the Eighth Circuit and can see no reason for repeating that analysis here. However, Teague and its progeny have recognized two exceptions to the non-retroactivity doctrine during habeas review. If this

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[1]Hartman, To Be or Not to Be a New Rule: The Non-Retroactivity of Newly Recognized Constitutional Rights After Conviction, 29 Cal. W.L.R. 53, 57-58 (1992).

[2]See also, Penry v. Lynaugh, 492 U.S. 302 (1989), Butler v. McKellar, 494 U.S. 407 (1990).

Court finds respondent to be the beneficiary of a new rule, both exceptions are applicable to the Eighth Circuit holding.

B.

FIRST EXCEPTION TO TEAGUE

If it is a new rule to apply the Double Jeopardy Clause to certain fact-finding, during a non-capital sentencing, where the state has previously offered insufficient evidence, the rule is encompassed by the first exception to the collateral review, non-retroactivity doctrine.

> "The first exception permits the retroactive application of a new rule if the rule places a class of private conduct beyond the power of the State to proscribe, see (cite omitted), or addresses a "substantive categorical guarante[e] accorded by the Constitution," such as a rule "prohibiting a certain category of punishment for a class of defendants because of their status or offense." Graham v.

Collins, ___ U.S. ___, ___, 113 S.Ct. 892, 903 (1993) (cites omitted).

The rule applied by the Eighth Circuit addresses the application of the Double Jeopardy Clause (a substantive categorical guarantee accorded by the Constitution) which prohibits determination of persistent offender status (a certain category of punishment) for defendants, where at a first hearing the state failed to produce sufficient evidence to persuade the fact-finder of respondent's persistent offender status (class of defendants because of their status). In summary, application of the Double Jeopardy Clause would make respondent ineligible for persistent offender status.

In Penry, at 329-330, the Court identified two examples of the application of the first exception to the Teague rule. The Penry Court cited Coker v. Georgia, 433

U.S. 584 (1977). The Court in Coker held that the Eighth Amendment (a substantive categorical guarantee accorded by the Constitution) prohibits imposition of the death penalty (a certain category of punishment) for the rape of an adult woman (class of defendants based on their status or offense). Coker is similar to respondent's situation because the rule in Coker did not foreclose the state from imposing punishment on Coker, it merely foreclosed application of a specific penalty determined by his offense.

Likewise, the Court's second example, Ford v. Wainwright, 477 U.S. 399 (1986), held that the Eighth Amendment (a substantive categorical guarantee accorded by the Constitution) prohibited carrying out the death sentence (a certain category of punishment) against death row inmates who were presently incompetent to be

executed (class of defendants based on their status or offense). Ford also did not foreclose punishment. Ford is similar to respondent's situation because both prevent imposition of a specific punishment on a class of offenders based on their status.

The first exception to Teague's retroactivity holding applies. The Court of Appeals properly reached the substantive double jeopardy issue presented by respondent's application for a writ of habeas corpus.

C.

SECOND EXCEPTION TO TEAGUE

At first blush, the policies underlying the Double Jeopardy Clause do not appear to support the values of accuracy and reliability which undergird the second exception to Teague.

Under the second exception, a new

> rule may be applied on collateral review "if it requires the observance of 'those procedures that . . . are "implicit in the concept of ordered liberty."'" Butler v. McKellar, at 416.

This test has been supplemented by a requirement that the new rule "not seriously diminish the likelihood of obtaining an accurate determination...." Butler at 357. The Double Jeopardy Clause has always been considered a bedrock procedural protection implicit in the concept of ordered liberty. Robinson v. Neil, 409 U.S. 505 (1973). However, the procedural protection of the Double Jeopardy Clause is generally not designed to foster accuracy. The Clause enforces finality concerns. However, in one clear way, application of the Double Jeopardy Clause directly impacts accuracy and reliability. By barring repeated attempts to prove an allegation, the Double Jeopardy

Clause motivates the prosecution to treat the first hearing as the main event. United States v. Scott, 437 U.S. 82, 106-108 (1978). The state is required to gather and present all of its evidence. The Double Jeopardy Clause provides a strong incentive for a reliable first determination of the state's accusation, since the state is not permitted a "second bite at the apple." Burks v. United States, 437 U.S. 1, 17 (1978).

In Benton v. Maryland, 395 U.S. 784, 794 (1969), this Court held that;

> the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage, and that it should apply to the States through the Fourteenth Amendment.

This holding was held fully retroactive. Ashe v. Swenson, 397 U.S. 436 (1970). Further, in Robinson v. Neil, supra., now Chief Justice Rehnquist, writing for a

unanimous Court, held the double jeopardy holding in Waller v. Florida, 397 U.S. 387 (1970), fully retroactive. The Court in Robinson stated that the

> guarantee against double jeopardy is significantly different from procedural guarantees [which have been] held . . . to have prospective effect only. While this guarantee, like the others, is a constitutional right of the criminal defendant, its practical result is to prevent a trial from taking place at all, rather than to prescribe procedural rules that govern the conduct of a trial. Id. at 509.

The rule that the Double Jeopardy Clause bars relitigation of the status of being a persistent offender in Missouri once the state has failed to adduce sufficient evidence, is parallel to the rule in Robinson. In Robinson, at 509-510, the Court pointed out that in

> Furman v. Georgia, [408 U.S. 238 (1972)], our mandate was tailored so as to deny to the State only the authority to impose a punishment that we held

> unconstitutional, without the necessity of a redetermination of the factual question of whether the offense had in fact been committed. Thus, the prejudice to the State resulting from the necessity of an entirely new trial because of procedures newly found to be constitutionally defective, with the attendant difficulties of again rounding up witnesses whose memories would of necessity be dimmer for the second trial than for the first, was not present. That which was constitutionally invalid could be isolated and excised without requiring the State to begin the entire fact finding process anew.

In fact, the Double Jeopardy Clause forbids relitigating the persistent offender status of respondent altogether.

One of the strongest considerations in determining whether a particular rule should be considered under the second exception is whether it is fundamental to our concept of ordered liberty. This Court has consistently held under the various theories of retroactivity that double jeopardy holdings are fully retroactive.

There is simply no reason to view this double jeopardy question differently.

The second exception to Teague's non-retroactivity holding applies. The Eighth Circuit Court of Appeals properly reached the substantive double jeopardy issue presented by respondent's application for a writ of habeas corpus.

II.

The Fifth Amendment to the Constitution of the United States provides in part "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

> Jeopardy denotes risk. In the constitutional sense, jeopardy describes the risk that is traditionally associated with a criminal prosecution. Breed v. Jones, 421 U.S. 519, 528 (1975).

Is allowing the state repeated opportunities to try to prove its claim that respondent is eligible for treatment

as a persistent offender putting respondent "in jeopardy?" The Court of Appeals answered this question in the affirmative. After the state has had one full and fair opportunity to prove its own allegations, a defendant acquires an interest in finality protected by the Double Jeopardy Clause.

Burks, supra., held that the Double Jeopardy Clause forbids a retrial after an acquittal, whether the acquittal is a decision by the original fact-finder or an appellate reversal for insufficiency of the evidence.

> The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. (footnote omitted) This is central to the objective of the prohibition against successive trials. The Clause does not allow "the State... to make repeated attempts to convict an individual for an alleged offense," since [t]he constitutional prohibition

> against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense." Burks, at 11. (cites omitted).

Mr. Bohlen has run the persistent offender gauntlet.[3] The trial court's discretion was sufficiently channeled. Mo. Rev. Stat. §559.021.1 gave the court one of two options, 1) finding respondent a persistent offender or 2) finding that the state had failed to prove the persistent offender charge. Further, respondent endured a trial-like process. Missouri's persistent offender statutes, as crafted by that state's legislature, requires that the

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[3]"As we have explained on numerous occasions, the bar to retrial following acquittal or conviction ensures that the State does not make repeated attempts to convict an individual, thereby exposing him to continued embarrassment, anxiety, and expense, while increasing the risk of an erroneous conviction or an impermissably enhanced sentence." Ohio v. Johnson, 467 U.S. 493, 498-9 (1984) (emphasis added).

court find a defendant to be a persistent offender if the state proves all of the essential elements of the persistent offender charge beyond a reasonable doubt. Mo. Rev. Stat. §559.021.2.[4] The court is required to make findings of fact, Mo. Rev. Stat. §559.021.1(3), and the defendant is accorded full rights of confrontation and cross-examination with the opportunity to present evidence. Mo. Rev. Stat. §559.021.4. Finally, respondent has endured the embarrassment, insecurity, anxiety and expense of defending against being classified, stigmatized and further

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[4]Missouri's use of the beyond a reasonable doubt standard indicates that the interests of the accused are "of such magnitude that ... they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgement." Addington v. Texas, 441 U.S. 418, 423-424 (1979). This standard evinces the legislature's determination that the entire risk of non-persuasion (and nonproduction) rests on the State.

punished under the Missouri statutory scheme.

> An acquittal is accorded special weight. "The constitutional protection against double jeopardy unequivocally prohibits a second trial following an acquittal," for the "public interest in the finality of criminal judgments is so strong that an acquitted defendant may not be retried even though 'the acquittal was based upon an egregiously erroneous foundation." See Fong Foo v. United States, 369 US 141, 143 [(1962)]." United States v. DiFrancesco, 449 U.S. 117, 129 (1980).

It is the state's failure to persuade, not the defendant's innocence that triggers the double jeopardy bar.

The petitioner's persistent failure to offer evidence in support of its allegation and a routine application of Burks would result in barring further proceedings on the habitual offender allegation based on insufficiency of the evidence. See also, Hudson v. Louisiana, 450 U.S. 40 (1981).

The question presented here is whether the Missouri legislature intended its persistent offender proceeding to be final for double jeopardy purposes. Missouri v. Hunter, 459 U.S. 359 (1983).[5] The procedural protections established by Missouri's legislature raise a powerful presumption that the Double Jeopardy Clause applies to persistent offender proceedings.

In Tibbs v. Florida, 457 U.S. 31, 45

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[5]Amici acknowledges that this articulation of the issue highlights the tension created by a specific provision of the Bill of Rights being interpreted as a tool for divining legislative intent, rather than as a substantive limitation. McKay, Double Jeopardy: Are the Pieces the Puzzle?, 23 Washburn L.J. 1, 2-6 (1983); Patterson, Missouri v. Hunter and the Legislature: Double Punishment without Double Jeopardy, 37 Ark. L. Rev. 1000, 1012 (1984) ("[T]he decision, [Hunter,] does appear to render the double jeopardy clause simply inapplicable to the legislature in the area of substantive multiple punishment."). This case does not require resolving this tension, because Missouri's treatment of its persistent offender procedures is consistent with finding the Double Jeopardy Clause applicable.

n. 22 (1982) this Court suggested that a legislature could change the rules in response to an extension of double jeopardy protections to reweighing decisions. There are constitutional limitations on the legislative prerogative concerning recidivist provisions.[6]

Specht v. Patterson, 386 U.S. 605 (1967) involved a Colorado statute which authorized involuntary confinement from one day to life for certain sex offenders. The Colorado procedure had the effect of increasing the amount of the confinement the defendant was eligible for and attached an additional stigmatizing label to the defendant. This Court held,

> [d]ue process, in other words, requires that he be present with

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[6]In Mullaney v. Wilbur, 421 U.S. 684 (1975), this Court held that an element of the crime of murder cannot be shifted to the defendant through the subterfuge of relabeling.

> counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own. And there must be findings adequate to make meaningful any appeal that is allowed." Id. at 610.

Missouri's persistent offender statute similarly results in exposing defendants to increased punishment and a stigmatizing label.

III.

This Court has applied Burks' acquittal rationale to sentencing several times in the death penalty context. The government is barred from repeatedly exposing an offender to the risk of a death penalty after the state has offered insufficient evidence at its first full and fair opportunity to convince the sentencer that death is the appropriate punishment. Bullington v. Missouri, supra (jury sentencing); Arizona v. Rumsey, 467 U.S.

203 (1984) (judge sentencing). In Bullington, this Court recognized the legitimate finality concerns which are triggered by the prosecution's failure to persuade the jury of the appropriateness of death.

In contrast to Burks' acquittal-based holding, this Court in Tibbs v. Florida, supra., turned back a double jeopardy claim when a Florida appellate court reweighed evidence and reversed a conviction. It was a straight forward application of the "sufficiency/trial error" distinction.[7] When the sentencer is persuaded by the state's evidence in the first hearing to

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[7]Lower courts understand this distinction. For example, in Tate v. Armontrout, 914 F.2d 1022, 1026-7 (8th Cir. 1990) the court noted that "Tate's was not a case of the state getting a second chance to prove something it had failed to prove the first time, the heart of double jeopardy's bar. See, Burks, at 11. Rather, it was Tate who got a chance to attack the state's evidence."

impose a death sentence, an effort to reimpose the death penalty is permitted if the intervening reversal is for trial error, rather than for insufficiency of the evidence. Poland v. Arizona, 476 U.S. 147 (1986).

Respondent comes clearly under the Burks acquittal rule. Unless this Court reaches out[8] to overrule Bullington and Rumsey, Bohlen v. Caspari, was correctly decided and the judgement should be affirmed. Amici reluctantly addresses the

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[8]See Simpson v. United States, 435 U.S. 6, 11-12 (1978). "Before an examination is made to determine whether cumulative punishments for the two offenses are constitutionally permissible, it is necessary, following our practice of avoiding constitutional decisions where possible, to determine whether Congress intended to subject the defendant to multiple penalties for the single criminal transaction in which he engaged." (Emphasis supplied).

vitality of Bullington and Rumsey.[9]

IV.

Bullington, at 446, held that

> [h]aving received "one fair opportunity to offer whatever proof it could assemble," Burks v. United States, at 16, the State is not entitled to another.

In assessing whether the State had its fair opportunity to prove that death was the appropriate penalty, the Court focused on three traditional measures of double jeopardy application.[10] First, the Court pointed out that

> Missouri law provides two, and only two, possible sentences for

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[9]"Although adherence to precedent is not rigidly required in constitutional cases, any departure from the doctrine of stare decisis demands special justification...." There is not a sufficient reason to warrant the Court in "taking the exceptional action of overruling Bullington." Rumsey at 212.

[10]Applying the same test announced in Bullington, respondent's appellate acquittal is entitled to double jeopardy protection.

> a defendant convicted of capital murder . . . . [And,] the Missouri statutes contain substantive standards to guide the discretion of the sentencer. Bullington at 432-433.

Second, the court focused on the Missouri statutes which "also afford procedural safeguards to the convicted defendant."[11] Id., at 433. Finally, the court acknowledged that the

> "embarrassment, expense and ordeal" and the "anxiety and insecurity" faced by a defendant at the penalty phase of a Missouri capital murder trial surely are at least equivalent to that faced by any defendant at the guilt phase of a criminal trial. Id., at 445.

Ultimately, the court pointed out that

> [b]y enacting a capital sentencing procedure that resembles a trial on the issue of guilt or innocence, however, Missouri explicitly requires the jury to determine whether the prosecution has 'proved its case.' Id., at 444.

Examination of the factor of nondiscretionary decision making distinguishes Bullington from DiFrancesco v. United States, supra.. In DiFrancesco, the United States sought to appeal, "claiming that the District Court abused its discretion in imposing" the sentence it did. Id., at 125. There was simply no occasion to address the double jeopardy implications of a government appeal from its own failure to prove the defendant's status as a special dangerous offender. Until Bullington, none of the Court's previous cases, addressing double jeopardy implications at sentencing, involved proceedings which had the hallmarks of a

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[11]As this Court noted in Specht at 610 "[t]he case is not unlike those under recidivist statutes where an habitual criminal issue is a 'distinct issue.' (Graham v. West Virginia, 224 U.S. 616, 625 (1912), on which a defendant 'must receive reasonable notice and an opportunity to be heard.' (cite omitted).

criminal trial.[12] Thus, double jeopardy protections were not triggered.

The existence of specific procedural protections is the same test that was used by the majority recently in Dixon v. United States, ___ U.S. ____, 113 S.Ct. 2849 (1993). The Court held that the Double Jeopardy Clause applies to criminal nonsummary contempt proceedings.

> We have held that constitutional protections for criminal defendants other than the double jeopardy provision apply in nonsummary criminal contempt prosecutions just as they do in other criminal prosecutions. See, e.g., Gompers v. Bucks Stove and Range Co., 221 U.S. 418, 444 (1911) (presumption of innocence, proof beyond a reasonable doubt, and guarantee against self-incrimination); Cooke v. United States, 267 U.S. 517, 537 (1925) (notice of charges, assistance of counsel, and right to present a defense); In re Oliver, 333 U.S. 257, 278 (1948) (public trial). We think it obvious, and today hold, that the protection of the Double Jeopardy Clause likewise attaches. (cites omitted). Dixon v. United States, ___ U.S. ___, ___, 113 S.Ct. 2849, 2856 (1993).

Status as a recidivist can have dramatic consequences. Solem v. Helm, 463 U.S. 277 (1983) (life without parole for recidivist violates Eighth Amendment under circumstances of case); Rummel v. Estelle, 445 U.S. 263 (1980) (life sentence for recidivist does not violate Eighth Amendment). Confronted with a never ending series of opportunities for the state to attempt to enhance a sentence, a defendant must prepare to defend himself over and over again. Such uncertainty interferes with correctional classification and programming. A defendant facing repeated efforts by the state to muster sufficient evidence suffers "anxiety and insecurity,

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[12]United States v. DiFrancesco, supra.; Chaffin v. Stynchcombe, 412 U.S. 17 (1973); North Carolina v. Pearce, 395 U.S. 711 (1969); Stroud v. United States, 251 U.S. 15 (1919).

embarrassment, expense and ordeal," Bullington, at 445. Missouri's persistent offender statutes offer a nondiscretionary, either/or choice, confined by strict procedures which subjects an offender to stress and anxiety.

Finally, petitioner provides a shockingly inequitable case for another crack at respondent. Petitioner did not bother to offer evidence when Missouri law required it. When the Missouri Court of Appeals ordered the record supplemented, petitioner did nothing.[13] There was no need for respondent to ask for a clean slate on appeal. To this day, petitioner has not even attempted to justify such nonfeasance.

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[13]Of course, respondent cannot claim that petitioner used its first two opportunities to "rehearse" its trial strategy.

CONCLUSION

Amici respectfully urges this Court to affirm the continuing vitality of Bullington and Rumsey. Amici respectfully urges this Court to affirm the applicability of the Double Jeopardy Clause to trial-like determinations of status, including the insufficiency based acquittal rule. Finally, amici respectfully urges this Court to affirm that these rules are fully retroactive. The Eighth Circuit Court of Appeals should be affirmed in all respects.

RESPECTFULLY SUBMITTED

National Legal Aid and
Defender Association,

National Association of

Criminal Defense Lawyers

Michael D. Gooch
Attorney for Amici
Deputy Lancaster County
Public Defender
555 South 10th Street
Lincoln, NE 68508
(402) 441-7631

(13)

No. 92-1500

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

PAUL CASPARI, Superintendent of the Missouri State Eastern Correctional Center, et al.,

Petitioner,

vs.

CHRISTOPHER BOHLEN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

KENT S. SCHEIDEGGER
CHARLES L. HOBSON*
Criminal Justice Legal Fdn.
2131 L Street (95816)
Post Office Box 1199
Sacramento, CA 95812
Telephone: (916) 446-0345

Attorneys for Amicus Curiae Criminal Justice Legal Foundation
*Attorney of Record

QUESTION PRESENTED

Should *Bullington* v. *Missouri* be overruled?

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

PAUL CASPARI, Superintendent of the Missouri State Eastern Correctional Center, et al.,

Petitioner,

vs.

CHRISTOPHER BOHLEN,

Respondent.

MOTION OF *AMICUS CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rule 37.3, the Criminal Justice Legal Foundation respectfully moves for leave to file the accompanying brief *amicus curiae* in support of petitioner in the above captioned case. Counsel for petitioner has consented, but counsel for respondent has refused consent.

In the accompanying brief, *amicus* argues that *Bullington* v. *Missouri* ought to be overruled.

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF) is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient and

reliable determination of guilt and swift execution of punishment.

Swift and sure punishment is an essential feature of any worthwhile criminal justice system. *Bullington*, by needlessly importing double jeopardy concepts into sentencing hearings, makes the sentencing process needlessly complex and too prone to giving windfalls to guilty defendants. This undermining of the criminal justice system is contrary to the interests CJLF was formed to protect.

For the foregoing reasons, *amicus curiae* requests leave to file its brief.

July, 1993

Respectfully submitted,

CHARLES L. HOBSON

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

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IN THE

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

SUMMARY OF FACTS AND CASE

On July 1, 1982, respondent Bohlen was convicted on three counts of first-degree robbery. On October 15, 1982, he was sentenced by the trial court to three consecutive 15-year terms as a persistent offender. The record did not show that any evidence of the necessary prior convictions for a persistent offender finding was presented at the trial or the sentencing hearing. *Bohlen* v. *Caspari*, 979 F. 2d 109, 110 (CA8 1992). His conviction was affirmed but the case was sent back for resentencing because of a lack of proof of his persistent offender status. On remand, the trial court found that he was a persistent offender and imposed the same sentence. *Ibid*. The Missouri Court of Appeals upheld the second sentence on the ground that the Double Jeopardy Clause

does not apply to sentencing. *State* v. *Bohlen*, 698 S. W. 2d 577, 578 (Mo. Ct. App. 1985).

On September 15, 1989, Bohlen petitioned for federal habeas corpus. The District Court denied the petition, but the Eighth Circuit reversed, holding that the resentencing violated *Bullington* v. *Missouri*, 451 U. S. 430 (1981). 979 F. 2d, at 115.

SUMMARY OF ARGUMENT

Stare decisis does not preclude a re-examination of *Bullington* v. *Missouri*. That case contradicts prior precedents without overruling them. This creates confusion and disrespect for precedent, contrary to the interests *stare decisis* seeks to protect. Because *Bullington* is a constitutional decision, it must be afforded less protection under *stare decisis*. As *Bullington* has also been compromised by *Poland* v. *Arizona*, it should be re-examined.

Bullington should be overruled. It is contrary to both the history of the Double Jeopardy Clause, and this Court's interpretation of it. By focusing on the procedure involved rather than the hearing's consequences to defendant, *Bullington* is contrary to the principles of the Double Jeopardy Clause. Finally, as it punishes states for expanding protections to defendants, *Bullington* discourages state experimentation in criminal procedure in a particularly inappropriate matter.

ARGUMENT

I. *Stare decisis* does not prevent *Bullington* from being overturned.

In *Arizona* v. *Rumsey*, 467 U. S. 203, 212 (1984), this Court declined to overrule *Bullington* v. *Missouri*, 451 U. S. 430 (1981), a case it had "decided only three years ago." *Amicus* submits that it is now time for a re-examination of *Bullington*. The perspective of time, this Court's retreat from *Bullington* in *Poland* v. *Arizona*, 476 U. S. 147 (1986), and *Bullington*'s possible spread outside the death penalty all provide reasons to re-examine this 12-year-old decision.

A. The Limits of Stare Decisis.

While *stare decisis* is an important doctrine serving a useful social policy, it does not have the same force as a statute or the Constitution. The Judiciary's role in our society is as an interpreter of laws. See The Federalist No. 78, at 467 (A. Hamilton) (Rossiter ed. 1961). Therefore, *stare decisis*, while respected, cannot deter this or any other court from its ultimate duty of interpreting the law. *Stare decisis* is the servant, not the master, of the law.

This Court has recognized that the doctrine does not have the force of a rule of law and may be overridden when appropriate. "Whether it [*stare decisis*] shall be followed or departed from is a question entirely within the discretion of the court . . . ." *Hertz* v. *Woodman*, 218 U. S. 205, 212 (1910). While it will be followed in most cases, this is only because usually "it is more important that the applicable rule of law be settled than it be settled right." *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 406 (1932) (Brandeis, J., dissenting).

Perhaps the most important factor in limiting *stare decisis* is the ability of other bodies to overturn this Court's decisions. This Court is particularly reluctant to overturn its own statutory interpretations, because Congress "remains free to alter what [this Court has] done." *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 172-173 (1989).

Constitutional cases are another matter. Because " 'correction through legislative action is practically impossible,' " constitutional cases are more prone to re-examination than statutory cases. *Payne* v. *Tennessee*, 115

L. Ed. 2d 720, 737, 111 S. Ct. 2597, 2610 (1991) (quoting *Burnet*, *supra*, 285 U. S., at 407 (Brandeis, J., dissenting)); cf. *Patterson*, *supra*, 491 U. S., at 172-173. Given the necessary tension between our democratic ideals and judicial review under the Constitution, see Rehnquist, The Notion of a Living Constitution, 54 Tex. L. Rev. 693, 695-696 (1976), this Court must be ready to re-examine its constitutional decisions in order to maintain the democratic nature of our society.

Refusing to re-examine an incorrect opinion that the public cannot overturn is corrosive to this Court's public respect. Thus the decision to uphold the incorrectly decided line of cases under *Lochner* v. *New York*, 198 U. S. 45 (1905) until 1937 helped to damage this Court as a public institution. See *Planned Parenthood* v. *Casey*, 120 L. Ed. 2d 674, 704-705, 112 S. Ct. 2791, 2812 (1992) (lead opinion). "Of course it is embarrassing to confess a blunder; it may prove even more embarrassing to adhere to it." *United States* v. *Bryan*, 339 U. S. 323, 346 (1950) (Jackson, J., concurring).

This Court is also more willing to re-examine decisions that have developed contradictions over time. Thus, this Court will not allow *stare decisis* to preserve inconsistent or difficult to administer decisions. See *Patterson*, *supra*, 491 U. S., at 173. Similarly, if the conditions that motivated a decision change, then there is good reason to overrule the prior decision. See *Casey*, *supra*, 120 L. Ed. 2d, at 700, 112 S. Ct., at 2809 (lead opinion).

The fact that *stare decisis* is not a "mechanical rule" is demonstrated by the hierarchy within the doctrine. While some decisions are virtually etched in stone, others warrant more flexibility. For those cases less worthy of *stare decisis*, " 'the process of trial and error so fruitful in the physical sciences is appropriate also in the judicial function.' " *United States* v. *Scott*, 437 U. S. 82, 101 (1978) (quoting *Burnet*, *supra*, 285 U. S., at 408 (Brandeis, J., dissenting)).

B. Bullington as Precedent.

When deciding whether *stare decisis* should preserve a decision from re-examination, this Court "is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case." *Planned Parenthood* v. *Casey*, 120 L. Ed. 2d 674, 700, 112 S. Ct. 2791, 2808 (1992) (lead opinion). This involves a look into the type of decision involved, the reliance interest it invokes, and what impact overruling the decision would have on the public's perception of the rule of law. See part I A, *ante*, at 3-4. In light of these factors, *Bullington* v. *Missouri*, 451 U. S. 430 (1981) invokes minimal protection from *stare decisis*.

1. Contrary to precedent.

The strongest argument against *Bullington* is *Bullington*'s own treatment of precedent. The *Bullington* decision cannot be squared with this Court's previous decisions on the relationship between the Double Jeopardy Clause and sentencing. Decisions that do not respect precedent should not be preserved simply as a matter of *stare decisis*. If a decision improperly overrules or distinguishes a set of precedents, *stare decisis* must not prevent a return to the earlier, correct decisions.

The *Bullington* Court understood that there was tension between its decision and prior case law. It framed the issue as whether *Stroud* v. *United States*, 251 U. S. 15 (1919) applied to a modern capital sentencing system. See *Bullington*, *supra*, 451 U. S., at 431-432. The Court found that imposing double jeopardy protections on modern capital sentencing schemes did not conflict with *Stroud* or any other precedents. The earlier decisions which refused to apply double jeopardy to sentences dealt with sentencing proceedings that were less complicated and thus less trial-like than the Missouri death sentence

procedure in *Bullington*. See *id.*, at 438-441. This distinction allowed the *Bullington* Court to impose double jeopardy protections on Missouri's capital sentencing system without formally having to overrule any precedents. See *id.*, at 446.

Bullington distinguished four precedents, *United States* v. *DiFrancesco*, 449 U. S. 117 (1980), *Chaffin* v. *Stynchcombe*, 412 U. S. 17 (1973), *North Carolina* v. *Pearce*, 395 U. S. 711 (1969),[1] and *Stroud* v. *United States*, *supra*. Each of these cases is at least substantially compromised by the *Bullington* decision. Although *Bullington* claimed that it did not overrule these decisions, the effect of *Bullington* was to make these cases shadows of their former selves.

The first case distinguished, *Stroud*, provides perhaps the starkest conflict between *Bullington* and earlier precedent. Robert Stroud, the Birdman of Alcatraz,[2] was convicted of first-degree murder for killing a guard at Leavenworth prison and sentenced to death. His conviction was reversed, he was retried and again convicted of first-degree murder, but this time only sentenced to life. This conviction was also reversed and at his second retrial Stroud was again found guilty of first-degree murder and sentenced to death. 251 U. S., at 16-17. Stroud challenged his last death sentence as being barred under double jeopardy by the life sentence imposed after the first retrial. *Id.*, at 17.

The *Stroud* Court held that sentencing was irrelevant to the Double Jeopardy Clause. "The fact that the jury may thus mitigate the punishment to imprisonment for life did not render the conviction less than one for first-degree murder." *Id.*, at 18. The *Stroud* Court understood

1. The companion case to *Pearce*, *Simpson* v. *Rice*, was overruled on other grounds in *Alabama* v. *Smith*, 490 U. S. 794, 802-803 (1989).

2. See *Chaffin*, *supra*, 412 U. S., at 23.

that jeopardy attached to acquittals from guilt, not sentences.[3] "The protection afforded by the Constitution is against a second trial for the same *offense*." *Ibid.* (emphasis added).

Bullington's attempt to distinguish *Stroud* is unsuccessful. It is true that *Stroud* and *Bullington* dealt with different sentencing procedures. *Stroud* involved a relatively uncomplicated system where the jury was simply asked whether defendant should not be given a death sentence, see *Bullington*, *supra*, 451 U. S., at 439, n. 11, while *Bullington* dealt with one of the death penalty proceedings that evolved after *Furman* v. *Georgia*, 408 U. S. 238 (1972). But this difference is irrelevant for the purpose of double jeopardy.

Double jeopardy is not imposed because a proceeding is relatively complicated, but because the proceeding involves the most important decision the law can make, whether a person is guilty of a crime. This is demonstrated in *United States* v. *Dixon*, 61 U. S. L. W. 4835 (June 28, 1993), where this Court held that the Double Jeopardy Clause applied to nonsummary criminal contempt proceedings. It did so not because of how the proceedings were conducted, but because of what was at stake at the contempt proceedings. "It is well established that criminal contempt, at least the sort enforced through nonsummary proceedings, is '*a crime in the ordinary sense*.' " *Id.*, at 4837, quoting *Bloom* v. *Illinois*, 391 U. S. 194, 201 (1968) (emphasis added). As other constitutional protections applied to nonsummary contempt proceedings "just as they do in other criminal prosecutions," there was no reason not to apply the Double Jeopardy Clause. *Ibid.*

3. Double jeopardy does place one limit on sentences. It prevents a person from being punished twice for the same crime. See *Ex parte Lange*, 18 Wall. (85 U. S.) 163, 176 (1874). Neither *Bullington* nor the present case involves this type of multiple punishment.

In using the trial-like nature of Missouri's death sentence procedure to impose double jeopardy protections, *Bullington* placed the cart before the horse. Whether a proceeding is like a trial does not determine what constitutional rights it invokes; what matters is what is at stake. Thus in *In re Oliver*, 333 U. S. 257 (1948), this Court held that defendant had a right to a public trial in a contempt proceeding held by a "one-man grand jury." The grand jury could hold a witness in contempt without affording the witness anything resembling a trial. *Id.*, at 262. In spite of the fact that this proceeding in no way resembled a trial, the right to public trial was imposed because of the serious consequences of a contempt finding.

> "Here we are concerned, not with petitioner's rights as a witness in a secret grand jury session, but with his rights as a defendant in a contempt proceeding. The powers of the judge-grand jury who tried and convicted him in secret and sentenced him to jail on a charge of false and evasive swearing must likewise be measured, not by the limitations applicable to grand jury proceedings, *but by the constitutional standards applicable to court proceedings in which an accused may be sentenced to fine or imprisonment or both.*" *Id.*, at 265 (emphasis added).

Eventually, this Court added so many rights to the nonsummary contempt proceeding that it now resembles a trial. See *Dixon*, *supra*, 61 U. S. L. W., at 4837. But these were imposed not because of the complexity of the proceedings, but because of the consequences of a contempt finding.

Bullington also implied that the fact that the death penalty was involved made the sentencing hearing more like a trial. See 451 U. S., at 445. This placed *Bullington* in direct conflict with *Stroud*. The *Stroud* juries had to make the same decision as the juries in *Bullington*, whether defendant should be sentenced to death or

imprisonment. This was a very important decision. It did not, however, influence the *Stroud* Court. This was still no more than a sentencing question. As it did not go to the question of guilt, double jeopardy was irrelevant. See 251 U. S., at 18.

The law of capital punishment did change between *Stroud* and *Bullington*. Starting with *Furman* v. *Georgia*, *supra*, this Court has invoked the Eighth Amendment to make radical changes in how, when and against whom the death penalty is imposed. But *Bullington* is not an Eighth Amendment case. In support of its "death is different" argument, *Bullington* relies on *Green* v. *United States*, 355 U. S. 184 (1957), *United States* v. *DiFrancesco*, 449 U. S. 117 (1980), *Addington* v. *Texas*, 441 U. S. 418 (1979), and *Burks* v. *United States*, 437 U. S. 1 (1978). *Bullington*, *supra*, 451 U. S., at 445-446. None of these cases involved the Eighth Amendment or capital punishment. See *Green*, *supra*, 355 U. S., at 185-186; *DiFrancesco*, *supra*, 449 U. S., at 120-121; *Addington*, *supra*, 441 U. S., at 419-420; *Burks*, *supra*, 437 U. S., at 2. Death may be different under the Eighth Amendment, but until the *Bullington* Court chose to bypass *Stroud*, death was not different for the purposes of the Double Jeopardy Clause.

North Carolina v. *Pearce*, *supra*, showed that lessons of *Stroud* were undiminished after 50 years. In *Pearce*, a non-capital case, defendant won a reversal of his first conviction, and was given a higher sentence upon being convicted at retrial. 395 U. S., at 713. The fact that the first sentence was shorter did not invoke double jeopardy. "Long-established constitutional doctrine makes clear that, beyond the requirement already discussed,[4] the guarantee against double jeopardy imposes no restrictions upon the length of a sentence imposed upon reconviction." *Id.*, at 719.

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4. That time served under the first sentence must be credited against whatever sentence is imposed after retrial. *Id.*, at 718-719.

This decision was the logical extension of the government's power to retry defendant following most reversals. "At least since 1919, when *Stroud* v. *United States*, 251 U. S. 15, was decided, it has been settled that a corollary of the power to retry defendant is the power, upon the defendant's reconviction, *to impose whatever sentence may be legally authorized*, whether or not it is greater than the sentence imposed after the first conviction." 395 U. S., at 720 (emphasis added).

Bullington sought to distinguish *Pearce* on the ground that it did not involve a separate sentencing proceeding. *Bullington*, *supra*, 451 U. S., at 439. Because the sentencer in *Pearce* had a wide range of potential sentences and no standards for guidance, this decision could not be compared to the one in *Bullington*. *Ibid*. Yet *Pearce* did not turn on how the sentence was arrived. Instead, it recognized that punishment and guilt are two separate issues, and only the latter invokes the Double Jeopardy Clause.

Chaffin v. *Stynchcombe*, 412 U. S. 17 (1973) received the same treatment from the *Bullington* Court as *Pearce*. *Chaffin* held that the underlying rationale of *Pearce* applies to jury sentencing as well as judge sentencing. *Id*., at 18. *Chaffin* reaffirmed both *Stroud* and *Pearce*, declining any invitation to overrule them. See *id*., at 24. *Bullington*'s effort to distinguish *Chaffin* by the nature of the proceeding was as unsuccessful as its effort to distinguish *Pearce*.

The final case distinguished by *Bullington*, *United States* v. *DiFrancesco*, *supra*, shows how far *Bullington* had to stretch to avoid precedent. DiFrancesco was convicted in federal court of racketeering offenses, and had his sentence enhanced as a dangerous special offender. 449 U. S., at 122. The United States appealed the dangerous offender sentence, claiming that the trial court abused its discretion in sentencing defendant to only one extra year for being a dangerous offender. See *id*., at 123. The

Court of Appeals dismissed the government's appeal on double jeopardy grounds. *Ibid*.

This Court held that the government's appeal of a sentence was not barred by double jeopardy. Appeal of a sentence could violate double jeopardy only if the initial sentence was viewed as an acquittal of any higher sentence. *Id*., at 133. Neither history nor precedent could support this proposition. Historically, pronouncement of sentence never carried the same finality that an acquittal did. *Ibid*. This was important because the "Double Jeopardy Clause was drafted with common-law protections in mind." *Id*., at 134.

Allowing the government to appeal a sentence was a natural application of *Stroud*, *Pearce*, and *Chaffin*. These cases "clearly establish that a sentence does not have the qualities of constitutional finality that attend an acquittal." See *id*., at 134-135. Any other result would overrule *Pearce*. See *id*., at 136, n. 14.

The sentencing proceeding in *DiFrancesco* had all the accoutrements of a trial. The dangerous special offender finding could be made only after a hearing in which defendant had a right to counsel, compulsory process, and cross-examination. The enhancement was imposed only if the trial court found by a preponderance of the evidence that defendant is a dangerous special offender. *Id*., at 118-119, n. 1.

In spite of the great similarity between this proceeding and the one in *Bullington*, the *Bullington* Court felt that it could distinguish *DiFrancesco*. First it noted that *DiFrancesco* involved only an "appellate review of a sentence 'on the record of the sentencing court,' [18 U. S. C.] § 3576, not a *de novo* proceeding that gives the Government the opportunity to convince a second factfinder of its view of the facts." *Bullington*, *supra*, 451 U. S., at 440. Yet *DiFrancesco* itself flatly rejected that very distinction. "While *Pearce* dealt with the imposition of a new sentence after retrial rather than as [in *DiFrancesco*], after appeal,

that difference is no more than a 'conceptual nicety.' " 449 U. S., at 135-136 (emphasis added). The issue in *DiFrancesco* was "whether a criminal sentence, once pronounced, is to be accorded constitutional finality and conclusiveness similar to that which attaches to a jury's verdict of acquittal." *Id.*, at 132.

The Court understood that there were "*fundamental distinctions* between a sentence and an acquittal, and to fail to recognize them is to ignore the particular significance of an acquittal." *Id.*, at 133 (emphasis added). This, not the particular procedures of the sentencing hearing, formed the basis of the holding in *DiFrancesco*.

Bullington's distinction cannot be squared with the rest of double jeopardy law. The government cannot appeal after an acquittal. *United States* v. *Wilson*, 420 U. S. 332, 352 (1975). If an appellate court reversed an acquittal and imposed a conviction on its own accord, it would be no less a violation of double jeopardy than if the government could retry an acquittal. See *Kepner* v. *United States*, 195 U. S. 100, 133 (1904). Yet *Bullington*, in its effort to avoid overruling *DiFrancesco*, would turn this difference into a distinction of constitutional significance. In so doing, it adds *Wilson* and *Kepner* to the list of precedents it flouts.

Bullington next tried to distinguish *DiFrancesco* on the ground that *DiFrancesco* involved a sentencing scheme where the judge had a far broader choice of possible sentences than the one in *Bullington*. *Bullington*, *supra*, 451 U. S., at 440-441. Once again, this is a distinction without any constitutional difference. *DiFrancesco* did not turn on the fact that the sentencer could impose any sentence not to exceed 25 years, a fact it only mentions in passing. See *DiFrancesco*, *supra*, 449 U. S., at 118-119, n. 1. The *DiFrancesco* Court relied in part upon *Stroud*, where, as in *Bullington*, the sentencing jury only had two options, life imprisonment or death. See *id.*, at 135 (citing *Stroud*); *Stroud*, *supra*, 251 U. S., at 17-18.

Finally, the *Bullington* Court attempted to distinguish the trial-like nature of the special offender hearing in *DiFrancesco* on the ground that it only required the prosecution to prove its case by a preponderance of the evidence, while the sentencing system in *Bullington* required proof beyond a reasonable doubt. 451 U. S., at 441. This distinction places too much emphasis on what is an anomaly of Missouri's capital sentencing scheme.

Many state capital sentencing schemes have a reasonable doubt standard for the eligibility finding but not for the final sentencing decision. See, *e.g.*, *People* v. *Frierson*, 25 Cal. 3d 142, 180, 599 P. 2d 587 (1979) (upholding California's 1977 death penalty law). This Court has upheld such systems. See, *e.g.*, *Pulley* v. *Harris*, 465 U. S. 37 (1984) (affirming California's 1977 law). If *Bullington* distinguished *DiFrancesco* because Missouri imposed the reasonable doubt standard on the final sentencing decision, then *Bullington* is based upon a procedural anomaly of Missouri's death penalty law. If the *Bullington* Court was referring to the fact that Missouri imposes the reasonable doubt standard for eligibility, then this decision is much narrower than commonly thought; it would not preclude resentencing a defendant to death if the first jury found him eligible but sentenced him to life. It would also be much more in conflict with *Poland* v. *Arizona*, 476 U. S. 147, 155-156 (1986) which declined to extend *Bullington* to eligibility findings. This would further weaken *Bullington* as precedent. See part I B 3, *post*, at 16-18.

DiFrancesco did not turn on the standard of proof. It was a continuation of cases starting with *Stroud* that jeopardy does not attach to the decision of the sentencer. The burden of proof for imposing a sentence was irrelevant to double jeopardy analysis until *Bullington*.

If *stare decisis* is to have any authority, cases must be distinguished only upon meaningful grounds. Any case can be "distinguished" from a prior decision. There will

always be some difference in the procedural posture or factual setting that will support a claim that the cases are different. If trivial differences are enough to distinguish cases, then *stare decisis* will have no meaning.

"[T]o view stare decisis as requiring identical decision only upon identical material facts as they are seen by the nonprecedent court . . . is to impose little constraint by the doctrine. Stare decisis, so loosely understood, leaves the nonprecedent court free to avoid the bonds of preceding cases by recasting their material facts *or assigning reasons to the prior decisions quite distinct from those originally assigned*. With this leeway, courts will seldom be faced with the necessity for explicit overruling." Monaghan, Taking Supreme Court Opinions Seriously, 39 Md. L. Rev. 1, 9, n. 37 (1979) (emphasis added).

Stroud, *Pearce*, *Chaffin*, and *DiFrancesco* all stand for one principle, that double jeopardy does not prevent the imposition at a later proceeding of a higher sentence that had been imposed at an earlier proceeding. In *Bullington*, this Court said that there were times when double jeopardy prevents imposing a higher sentence at a later hearing. Thus *Bullington* and *DiFrancesco* have been an example of this Court rendering mutually inconsistent decisions. See Easterbrook, Ways of Criticizing the Court, 95 Harv. L. Rev. 802, 811, n. 25 (1982). *Stare decisis* requires that this inconsistency be resolved.

This Court must resolve conflicts between its precedents. If a decision contradicts the principles of an earlier case, confusion in the lower courts is inevitable. If two decisions are in conflict, *stare decisis* does not prevent a return to an earlier correct decision. See *Helvering* v. *Hallock*, 309 U. S. 106, 119 (1940).

The resulting confusion weakens respect for the rule of law. Until this Court intervenes and decides which precedent prevails, the lower courts will have to struggle with the conflicting edicts from this Court. As similarly situated litigants are treated differently, people will

wonder whether the cases are decided by the rule of law, or personal fiat.

Inconsistent authorities also undermines confidence in judicial review.

> "[T]he Court's institutional position would be weakened were it generally perceived that the Court itself views its own decisions as little more than 'a restricted railroad ticket, good for this day and train only.' If courts are viewed as unbound by precedent, and the law as no more than what the last Court said, considerable efforts would be expended to get control of such an institution—with judicial independence and public confidence greatly weakened." Monaghan, Stare Decisis and Constitutional Adjudication, 88 Colum. L. Rev. 723, 753 (1988) (footnotes omitted) (quoting *Smith* v. *Allwright*, 321 U. S. 649, 669 (1944) (Roberts, J., dissenting)).

Bullington's cavalier avoidance of prior authority is the type of situational decision that can only undermine respect for *stare decisis* and this Court.

2. *Type of decision.*

The problems caused by *Bullington* are particularly severe because of the type of decision it is. *Bullington* is a constitutional decision, and unless the Constitution is amended, overruling is the only other method of correcting its errors. Thus constitutional decisions are traditionally afforded less *stare decisis* protection than statutory decisions, which are always susceptible to congressional action.

Some constitutional decisions warrant more *stare decisis* protection than others. These involve particularly divisive national controversies that this Court's decision has substantially resolved. See *Planned Parenthood* v. *Casey*, 120 L. Ed. 2d 674, 708, 112 S. Ct. 2791, 2815 (1992).

Bullington is not such a case. While it is important, the Double Jeopardy Clause has not and is not likely to divide the country. It involves the sort of technical issue that the lay public is unlikely to understand well, if at all. Cf. Douglas, Stare Decisis, 49 Colum. L. Rev. 735, 737 (1949). Double jeopardy is a very complicated part of the law. See *DiFrancesco*, *supra*, 449 U. S., at 127. Therefore, this Court has periodically reversed course and overruled prior double jeopardy decisions. See, *e.g.*, *United States* v. *Scott*, 437 U. S. 82, 87 (1978) (overruling *United States* v. *Jenkins*, 420 U. S. 358 (1975)); *Burks* v. *United States*, 437 U. S. 1, 6-10, 18 (1978) (overruling several prior cases); *United States* v. *Dixon*, 61 U. S. L. W. 4835, 4841 (June 28, 1993) (overruling *Grady* v. *Corbin*, 495 U. S. 508 (1990)). *Stare decisis* is at its weakest in this most technical part of the law.

3. Poland v. Arizona.

Bullington's potential for confusion is also demonstrated by this Court's retreat from it in *Poland* v. *Arizona*, 476 U. S. 147 (1986). In *Poland*, a capital case, the trial court erroneously held that a murder committed during an armed robbery could not support a murder for pecuniary gain finding. It nonetheless sentenced the defendants to death because it found that the murders were "especially heinous, cruel or depraved." *Id.*, at 149. The Arizona Supreme Court reversed the guilty verdict, found that there was insufficient evidence to support the especially heinous circumstance, and noted that murder for pecuniary gain was supported by armed robbery murder. On retrial, the defendants were again convicted on first-degree murder and again sentenced to death on the pecuniary gain, especially heinous grounds. *Id.*, at 149-150. The Arizona Supreme Court upheld the death sentences for both defendants on the pecuniary gain grounds. *Id.*, at 151.

This Court upheld the sentences, finding no conflict with *Bullington*. The *Poland* Court held that applying

double jeopardy to individual aggravating circumstances would require viewing "the capital sentencing hearing as a series of minitrials . . . . " *Id.*, at 156. This would push *Bullington*'s trial analogy "past the breaking point" and thus was unacceptable. *Ibid.*

While the decision not to extend *Bullington* was proper, it is very difficult to harmonize *Poland* with the rationale of *Bullington*. *Bullington* held that the decision not to impose death constituted an acquittal because the Missouri sentencing procedure that decided this issue was so like a trial. See *Bullington*, *supra*, 451 U. S., at 438. Using the same reasoning, this Court applied double jeopardy to Arizona's capital sentencing hearing. See *Arizona* v. *Rumsey*, 467 U. S. 203, 212 (1984). In Arizona, the decision on an individual aggravating circumstance is made at this same trial-like capital sentencing hearing. See *id.*, at 210. Like the penalty question in *Bullington*, in Arizona "[t]he usual rules of evidence govern the admission of evidence of aggravating circumstances, and the State must prove the existence beyond a reasonable doubt." *Id.*, at 210.

In spite of this near synonymity, the *Poland* Court refused to apply *Bullington*. The *Poland* Court asserted that its case was different because there had never been a verdict of life imprisonment. See *Poland*, *supra*, 476 U. S., at 154. Yet this runs contrary to double jeopardy principles. Once an appellate court finds that there was insufficient evidence to support a conviction, double jeopardy prevents retrial. *Burks* v. *United States*, 437 U. S. 1, 16 (1978). Furthermore, an erroneous acquittal is also protected under double jeopardy. *Sanabria* v. *United States*, 437 U. S. 54, 68-69 (1978). Thus the fact that the Arizona Supreme Court held that there was an improperly denied aggravating circumstance is irrelevant for double jeopardy purposes.

Poland represents a headlong retreat from the trial metaphor of *Bullington*. "[W]hen confronted in *Poland*

with the logical conclusion of the course it set in *Bullington*, the Court contents itself with a statement which in essence says simply: 'We will not go that far.' " Bennett, Double Jeopardy and Capital Sentencing: The Trial and Error of the Trial Metaphor, 19 N.M.L. Rev. 451, 465 (1989). When this Court backs off from a significant portion of a precedent, it is strong evidence that the precedent is unworkable and should be re-examined. Cf. *United States* v. *Dixon*, 61 U. S. L. W. 4835, 4840 (June 28, 1993) (decision in *United States* v. *Felix*, 118 L. Ed. 2d 25, 112 S. Ct. 1377 (1992), creating large exception to *Grady* v. *Corbin*, 495 U. S. 508 (1990), demonstrates the need to overrule *Grady*). After *Poland*, *Bullington* is an anomaly in the law, contradicted by cases decided before and after it.

When developments in the law rob a decision of its authority, it is time to re-examine the old decision. See *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 173 (1989). When a case contradicts "an 'unbroken line of decisions' . . . and has produced 'confusion' it is time to re-examine the precedent." *Dixon*, *supra*, 61 U. S. L. W., at 4841. Therefore, a re-examination of *Bullington* is in order.

II. *Bullington* should be overruled.

A. Wrongly decided.

When deciding whether a practice should invoke the Double Jeopardy Clause, this Court has looked to the historical treatment of the practice, this Court's precedents, and the underlying purpose of the Double Jeopardy Clause. See *United States* v. *DiFrancesco*, 449 U. S. 117, 132 (1980). Viewed through this analysis, sentencing, regardless of the procedural form it takes, cannot invoke the Double Jeopardy Clause's protection against retrial. *Bullington* failed to apply this analysis to the issue before it, and therefore was improperly decided.

1. History.

History is the most important tool for interpreting the Double Jeopardy Clause. Double Jeopardy is amongst our oldest legal principles, with roots as far back as Greek and Roman law. See J. Sigler, Double Jeopardy 2 (1969). While double jeopardy had an initially rocky start under the common law, Coke and Blackstone enshrined it as a part of England's legal heritage. See *id*., at 16-20. The Founders recognized the importance of this heritage and used Blackstone's definition as the basis of the Double Jeopardy Clause. See *United States* v. *Wilson*, 420 U. S. 332, 340-342 (1975). "The common law is important in the present context, for our Double Jeopardy Clause was drafted with the common-law protections in mind." *DiFrancesco*, *supra*, 449 U. S., at 134.

At the common law, the prohibition took the form of three pleas: *auterfoits acquit*, former acquittal; *auterfoits convict*, former conviction; and *auterfoits attaint*, former attainder. See 4 W. Blackstone, Commentaries *335-336 (1769). The first two interests are protected under the Double Jeopardy Clause, while former attainder is now obsolete. See *Sigler*, *supra*, at 18. The sentencing practices in *Bullington* and the present case invoke neither former acquittal nor former conviction.

Historically, neither of these protections were invoked by the pronouncement of sentence. The only limit on sentencing was the prohibition against punishing someone again after they had already completed the imposed sentence, or imposing a sentence greater than that allowed by law. See *Ex parte Lange*, 18 Wall. (85 U. S.) 163, 176 (1874). Neither of these prohibitions was invoked in *Bullington* or the present case. This is the furthest that double jeopardy extends into sentencing.

"Historically, the pronouncement of sentence has never carried the finality that attaches to an acquittal. The common law writs of *autre fois acquit* and *autre fois convict* were protections against retrial." *DiFrancesco*,

supra, 449 U. S., at 133. As imprisonment became the more common form of punishment, this distinction became more important. Thus a trial court could increase a sentence without violating double jeopardy, so long as it was done during the same term of the court as the initial sentence. See *Lange*, *supra*, 18 Wall., at 167. Similarly, it was "established practice in the federal courts that the sentencing judge may recall the defendant and increase his sentence, at least . . . so long as he has not yet begun to serve that sentence." *DiFrancesco*, *supra*, 449 U. S., at 134.

The Double Jeopardy Clause states that: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U. S. Const. Amend. V. This language was adopted to prevent the retrial of an acquitted defendant, while at the same time allowing a defendant to seek a new trial on appeal from the conviction. See *Wilson*, *supra*, 420 U. S., at 341. Thus, allowing a retrial after defendant's conviction is reversed[5] "is a well-established part of our constitutional jurisprudence." *United States* v. *Tateo*, 377 U. S. 463, 465 (1964). This principle is the basis for the modern distinction between sentencing and conviction. "[I]t rests ultimately upon the premise that the original conviction has, at the defendant's behest, been wholly nullified and the slate wiped clean." *North Carolina* v. *Pearce*, 395 U. S. 711, 721 (1969). As the slate has been "wiped clean" any legal sentence may be imposed upon retrial.[6]

> "But, so far as the conviction itself goes, and that part of the sentence that has not yet been served, it is no more than a simple statement of fact to say that the slate *has* been wiped clean. The conviction *has* been set aside, and the unexpired portion of the original sentence will never be served. A new trial may result in an acquittal. But if it does result in a conviction, we cannot say that the constitutional guarantee against double jeopardy of its own weight restricts the imposition of an otherwise lawful single punishment for the offense in question. To hold to the contrary would be to cast doubt upon the whole validity of the basic principle enunciated in *United States* v. *Ball*, *supra*, and upon the unbroken line of decisions that have followed that principle for almost 75 years." *Id.*, at 721 (emphasis in original).

5. Except when the reversal is for insufficient evidence. See *Burks* v. *United States*, 437 U. S. 1, 16 (1978).

6. Provided that any judge-imposed sentence is not vindictively higher than the original sentence and thus a violation of due process. See *id.*, at 726.

This principle is derived from the original intent behind the particular language of the Double Jeopardy Clause. The Clause was adopted in its particular form so that defendant could be tried and sentenced again after obtaining a reversal. Logic compels us to recognize, as the *Pearce* Court did, that if the slate is clean for the conviction, it must be so for the sentence.

The *Bullington* Court did not attempt any in-depth historical analysis of its position. While it made great efforts to distinguish the many cases its holding conflicted with, it ignored history. This failure to deal with history now warrants reversal.

"We may mystify any thing. But if we take a plain view of the words of the Constitution and give them a fair and obvious interpretation, we cannot fail in most cases of coming to a clear understanding of its meaning. We shall not have far to seek. We shall find it on the surface, and not in the profound depths of speculation." *Ex parte Siebold*, 100 U. S. 371, 393 (1880). It is time to bring the Double Jeopardy Clause back from *Bullington*'s "depth of speculation."

2. Precedent.

In addition to ignoring history, *Bullington* also has no support in precedent. Its contradiction of prior decisions, primarily *United States* v. *DiFrancesco*, *supra*; *Chaffin* v. *Stynchcombe*, 412 U. S. 17 (1973); *North Carolina* v. *Pearce*, *supra*; and *Stroud* v. *United States*, 251 U. S. 15 (1919) and its contradiction by *Poland* v. *Arizona*, 476 U. S. 147 (1986) are discussed extensively earlier in this brief. See part I B 1 & 3, *ante*, at 5-15, 16-18. In addition to weakening *stare decisis* support for the case, the fact that *Bullington* contradicts prior decisions and is contradicted by subsequent cases also provides a good reason for overruling *Bullington*. See *United States* v. *Dixon*, 61 U. S. L. W. 4835, 4841 (June 28, 1993).

3. Contrary to principles.

In addition to being contrary to history and precedent, *Bullington* is contrary to the general principles that form the foundation of the Double Jeopardy Clause. In its effort to distinguish *North Carolina* v. *Pearce*, *supra*, the *Bullington* Court called forth this Court's classic statement of the principles of the Double Jeopardy Clause.

> " 'The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Bullington*, *supra*, 451 U. S., at 445 (quoting *Green* v. *United States*, 355 U. S. 184, 187-188 (1957)).

Green recognizes two key protections are provided by the Double Jeopardy Clause: protecting the innocent from being convicted, and protecting the defendant from government harassment through repeated litigation.

Neither of these principles were violated by the state courts in *Bullington* or the present case.

Of these two goals, protecting the innocent is the most important. It is a fundamental principle of our criminal justice system that we must make all reasonable efforts to avoid convicting the innocent. Thus it is better to let ten guilty persons go free than to convict one innocent person. See 4 W. Blackstone, Commentaries *358 (1769).

Sentencing never comes into conflict with this principle. Before a defendant is sentenced, he must first be found guilty.

The second principle of *Green*, protecting defendants from harassment, is related to protecting the innocent. In addition to running the risk that an innocent person may be convicted, the threat of retrial may coerce an innocent person into pleading guilty to a lesser charge.

This is perhaps the most important part of double jeopardy. The ability to use its resources to coerce any citizen to do its will is an essential tool of the totalitarian state. Thus double jeopardy was foreign to the criminal law of Nazi Germany, Fascist Italy, and the pre-Khrushchev Soviet Union. See Sigler, *supra*, at 145-146.

As it relates to innocence, the ability of the state to wear down individuals is not invoked by sentencing. What matters is the issue of guilt. Until a person is found guilty, sentencing is irrelevant.

The Double Jeopardy Clause protects more than the innocent. It will even preserve an apparently erroneous acquittal. See *Green*, *supra*, 355 U. S., at 188. This serves double jeopardy's general protection against harassment. This interest is not served by treating a lesser sentence as an acquittal of a greater one.

Green fought to protect all acquitted defendants from undergoing additional "embarrassment, expense and ordeal." See *id.*, at 187. A new sentencing hearing cannot cause a defendant any further embarrassment. He

has already been convicted of a crime, the sentencing hearing simply determines his just deserts. Nor should the extra expense of the sentencing hearing justify double jeopardy protection. A resentenced defendant has already been through at least a trial, a sentencing hearing, and a successful appeal before being resentenced. Many will also have been through a second trial at their own request. See, *e.g.*, *Bullington*, *supra*, 451 U. S., at 436. Given the large proportion of defendants for whom the state pays defense costs, the additional expense of a second sentencing hearing is usually *de minimis*.

Nor is a new sentencing hearing a particularly harsh ordeal for defendant. He has already been through the ordeal of being convicted and is about to experience the ordeal of punishment. The sentencing hearing is simply the means of determining the extent of his future punishment. The fact that a higher sentence is imposed at the second hearing does not change this calculus. "The possibility of higher sentence was recognized and accepted as a legitimate concomitant of the retrial process." *Chaffin* v. *Stynchcombe*, 412 U. S. 17, 25 (1973).

Green also sought to protect defendants from the continued anxiety and insecurity caused by retrial. 355 U. S., at 187. Whatever extra anxiety and insecurity is caused by a new sentencing hearing is not of constitutional magnitude. The defendant has already been found guilty. He knows he is going to be punished, the only issue is how much. As *Chaffin* recognized, the possibility of a higher sentence after retrial is a legitimate part of retrial. 412 U. S., at 25.

Bullington attempts to make resentencing a greater cause of anxiety and ordeal when the death penalty is involved. *Bullington*, *supra*, 451 U. S., at 445. This is one of the most dangerous arguments in *Bullington*. While the death penalty has been treated differently than other sentences under the Eighth Amendment, the "death is different" argument has been confined to that part of the

criminal law. *Bullington*, by using this rationale to support an expansion of the Double Jeopardy Clause, threatens to make both death penalty procedure and the rest of constitutional criminal procedure needlessly complicated. Death penalty procedure is already complicated enough, there is no reason to make it more so by importing special rules to the rest of a defendant's constitutional rights. Similarly, double jeopardy is complicated enough as it is. See *United States* v. *DiFrancesco*, 449 U. S. 117, 126-127 (1980) (citing extensive and often inconsistent case law). There is no reason to further complicate it by imposing Eighth Amendment concepts.

While the sentencer's choice between a life sentence and death is important, this decision must be viewed in this context. A defendant facing this decision has already been convicted of a capital crime. A death sentence, so long as it is imposed in accordance with the Eighth Amendment, is a lawful sentence and should be treated the same as any other sentence. See *Bullington*, *supra*, 451 U. S., at 451-452 (Powell, J., dissenting).

B. Punishing Good Deeds.

In addition to being contrary to the law, *Bullington* also sets a disturbing example to the states. An important reason for its decision to extend the Double Jeopardy Clause to Missouri's capital sentencing scheme was the fact that it used the reasonable doubt standard. *Bullington* v. *Missouri*, 451 U. S. 430, 441 (1981). In the present case, the Eighth Circuit applied double jeopardy to Missouri's persistent offender hearing for the same reason. See *Bohlen* v. *Caspari*, 979 F. 2d 109, 113 (CA8 1992). Yet there is no constitutional requirement that sentencing findings be proved beyond a reasonable doubt. See part I B 1, *ante*, at 5. In other contexts, this Court has explicitly rejected the assertion that the sentencing decision requires all the protections of the guilty determination. See *Walton* v. *Arizona*, 497 U. S. 639, 647-648 (1990) (jury trial). *Bullington* and the case below, by

imposing greater constitutional burdens on a state procedure because it is more helpful to defendant, encourage states to provide the accused with only the minimum procedural protection. The chilling effect this has on state criminal procedure warrants overruling *Bullington*.

The Double Jeopardy Clause does not protect in measured steps. "[W]here the Double Jeopardy Clause is applicable, its sweep is absolute. There are no 'equities' to be balanced . . . ." *Burks* v. *United States*, 437 U. S. 1, 11, n. 6 (1978). This absolutism will in turn give appellate courts reason to review the factual basis of a sentence less strictly. "From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they are now in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution." *United States* v. *Tateo*, 377 U. S. 463, 466 (1964). The same reasoning applies to the sentencing hearing.

Bullington's continued existence will also cause states to withdraw protections from defendants in order to avoid the Double Jeopardy Clause. See, *e.g.*, *Swisher* v. *Brady*, 438 U. S. 204, 210-212 (1978) (state court changing juvenile court rules in response to district court ruling that state's juvenile justice system violated double jeopardy). Putting more structure into sentencing, making it more trial-like, may well be to defendant's benefit. Such structure would make them less subject to individual judges' whims and prejudices. Yet *Bullington* latches on to the trial-like aspect of the sentencing proceeding to extend the reach of the Double Jeopardy Clause.

Unless *Bullington* is removed, states will have every reason to weaken defendant's protections in order to avoid additional constitutional burdens. If the state can restructure a proceeding so that there is no chance of a double jeopardy violation, but the ultimate impact on defendant is the same or worse than had proceeding

remained unchanged, there is no reason to extend the Double Jeopardy Clause to the original proceeding. See *United States* v. *DiFrancesco*, 449 U. S. 117, 142 (1980). Substance, not form, is supposed to govern the Double Jeopardy Clause. See *ibid*.

Amicus submits that *Bullington* should be overruled. Any attempt to salvage *Bullington* "involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." *Helvering* v. *Hallock*, 309 U. S. 106, 119 (1940). This prior doctrine was first enunciated in *Stroud* v. *United States*, 251 U. S. 15 (1919), and most recently affirmed in *United States* v. *DiFrancesco*, 449 U. S. 117 (1980). The prior, better rule is simple. A sentencing decision does not have the finality of an acquittal; the Double Jeopardy Clause does not apply.

III. The retroactivity issue is entirely in the state's favor.

Applying *Bullington* v. *Missouri*, 451 U. S. 430 (1981) to noncapital sentences is so obviously a new rule, which could not be applied retroactively on habeas corpus under *Teague* v. *Lane*, 489 U. S. 288 (1989), that *amicus* will not brief the issue.

Teague does not, however, prevent this Court from overruling *Bullington* on habeas corpus even though overruling a prior decision is the definitive new rule under *Teague*. See *Butler* v. *McKellar*, 494 U. S. 407, 412 (1990). Because *Teague* does not prevent retroactive application of new rules favoring the prosecution, however, this Court may overrule *Bullington* in the present case.

Teague is designed to preserve the finality of convictions. See *Teague*, *supra*, 489 U. S., at 309-310. Because of the availability of habeas relief, new rules favorable to defendants can lead to the wholesale reversal of convic-

tions, undermining the finality that is crucial to our criminal justice system. See *id.*, at 309.

New rules favorable to the prosecution do not have this problem. The species of habeas corpus to which *Teague* applies can only be invoked by convicted defendants. See 28 U. S. C. § 2254(a). Double jeopardy will prevent the state from relitigating any acquittals based upon existing procedure. See *Burks* v. *United States*, 437 U. S. 1, 16 (1978). Thus a new rule favoring the state is vastly less disruptive to the system. Convicted defendants do not have as great an interest in finality or reliance on precedent as the state. See *Lockhart* v. *Fretwell*, 122 L. Ed. 2d 180, 191, 113 S. Ct. 838, 844 (1993).

Teague treats defendants and the state differently because they are differently situated.

> "The result of these differences is that the State will benefit from our *Teague* decision in some federal habeas cases, while the habeas petitioner will not. This result is not, as the dissent would have it, a 'windfall' for the State, but instead is a perfectly logical limitation of *Teague* to the circumstances which gave rise to it. *Cessante ratione legis, cessat et ipsa lex.*" *Id.*, 122 L. Ed. 2d, at 191, 113 S. Ct., at 844.

CONCLUSION

The decision of the Court of Appeals for the Eighth Circuit should be reversed.

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Respectfully submitted,

CHARLES L. HOBSON

Attorney for Amicus Curiae
Criminal Justice Legal Foundation